SUPREME COURT OF THE UNITED

OCTOBER TERM, 1910.

No. [illegible].

CHARLES H. SHAW, TRUSTEE, THE [illegible] HEAT & POWER CO., AND THE [illegible] CO., APPELLANTS,

vs.

THE CITY OF COVINGTON [illegible]

APPEAL FROM THE CIRCUIT COURT OF THE [illegible] SITTING AS A COURT OF EQUITY.

[illegible]

(16,872.)

(18,877.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 649.

CHARLES H. SHAW, TRUSTEE; THE UNION LIGHT, HEAT & POWER CO., AND THE SUBURBAN ELECTRIC CO., APPELLANTS,

vs.

THE CITY OF COVINGTON ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

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1 UNITED STATES OF AMERICA, } ss:
Eastern District of Kentucky, }

At a stated term of the circuit court of the United States, within and for the eastern district of Kentucky, in the sixth judicial circuit of the United States of America, begun and held at Federal Court hall in the city of Covington, Kentucky, in said district, on the first Monday in April, being also the 7th day of that month, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America the one hundred and twenty-seventh.

Present: Honorable A. M. J. Cochran, sitting as circuit judge.

Among the proceedings had were the following, to-wit:

CHARLES H. SHAW, Trustee in Bankruptcy of the Suburban Electric Company, a Corporation,
vs.
THE CITY OF COVINGTON and WILLIAM A. JOHNSON, Mayor of the City of Covington.

Be it remembered that heretofore, to-wit: on December 3rd, A. D. 1900, a bill in equity was filed herein in words and figures following, to wit:

United States Circuit Court, District of Kentucky.

2 CHARLES H. SHAW, Trustee in Bankruptcy of the Suburban Electric Company, a Corporation,
vs.
THE CITY OF COVINGTON and WILLIAM A. JOHNSON, Mayor of the City of Covington. } Bill in Equity.

To the honorable judges of the circuit court of the United States, district of Kentucky:

Your orator complaining says: That the Suburban Electric Company is a corporation created and existing by consolidation, under the provisions of the general law of the Commonwealth of Kentucky, of the Covington Electric Company of Covington, Kentucky, the Suburban Electric Illuminating Heating and Power Company of Newport, Kentucky, the Citizens Electric Light Company, of Dayton, Ky.

That all of said constituent companies were corporations organized under special acts of the General Assembly of the Commonwealth of Kentucky, and at the time of the consolidation thereof, into the Suburban Electric Company, said constituent companies were each of them engaged in the carrying on of the electric lighting and heating business as follows:—that is to say; the Covington Electric Light Company of Covington, Ky., was engaged in said business in

the city of Covington, Ky., the Suburban Electric Illuminating, Heating & Power Company was engaged in said carrying on of said business in Newport, Ky., and the Citizen's Electric Light Company, of Dayton, Ky., was engaged in the carrying on of said business in the city of Dayton, Ky., each of said companies owning and possessing their special corporate rights and franchises, and the electrical plant necessary to enable it to carry on its business as aforesaid.

3 2. That the said several constituent corporations, and the stockholders thereof, duly entered into the articles of consolidation, which they each, of date April 11, 1894, subscribed to, the stockholders in person, and the corporations by their respective secretaries and presidents, who also affixed the seal of their respective corporations, and each of said stockholders and officers duly acknowledged the execution of said articles of consolidation, before the county clerk of Campbell county, Ky., and said articles of consolidation were thereafter duly recorded in the counties of Campbell and Kenton, in the State of Kentucky, in the county clerk's office of each county, and then filed in the office of the secretary of state, at Frankfort, Ky., and the incorporation fee of $250.00, was paid into the treasury of the Commonwealth of Kentucky, thereon.

3. That by the terms of said articles of consolidation and the laws of the State of Kentucky, the said consolidated company, the Suburban Electric Company, succeeded to and retained each and all the property, franchises, lisenses, privileges, business, credits, assets, and effects granted or owned by each of the constituent companies, by the several acts of the legislature of this city incorporating them, or otherwise acquired by them, and being bound for all contracts, liabilities and obligations of each of the said constituent companies.

4. That said Covington Electric Light Company, of Covington, Ky., was created by an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to incorporate the *the* Covington Electric Light Company," approved April, 1882. That by said act, said Covington Electric Light Company was authorized and empowered to enter in and upon the streets and public places of the city of Covington, and therein lay its pipes and mains, and thereon erect its poles and posts and wires, through and along any street or highway in the city of Covington, or adjacent thereto as it may see fit, and to generate and supply to the city of Cov-

4 ington, and its inhabitants, and persons and corporations located in and near said city, light and motive power generated by electricity, and to supply light, power, or heat, generated by electricity, to the city of Covington, and such individuals or corporations contracting with it, for such price and compensation as may be agreed upon between said company and said individuals and corporations, and the said articles of incorporations further granted to the said Covington Electric Light Company, the exclusive privilege of conducting the business as above described therein, and adjacent to said city, for the term of twenty-five years.

That the said Covington Electric Light Company, in pursuance to the exclusive privilege granted to it by its said articles of incorporation, did, on the — days of —— 1884, enter upon the streets of the city of Covington, and erect thereon its poles and wires, and constructed in said city, at great expense to it, a large and expensive electric light plant, for the purpose of generating electric light and power, and heat, in pursuance of the powers conferred upon it by its said articles of incorporation, commenced and continued to supply the city of Covington and the citizens thereof with electric light and electric power, generated through the plant so constructed by it, and carried and furnished to the consumers thereof, over and by means of the poles and wires, constructed by it through the streets of Covington, as aforesaid. That the said Covington Electric Light Company was, at the time of its consolidation, into the Suburban Electric Company, as hereinbefore set out, in full possession of the business being conducted by it as aforesaid, and by said consolidation of the rights, privileges and properties owned by the said Covington Electric Light Company, including the exclusive privilege hereinbefore set out, passed to and became the property of the Suburban Electric Company.

5. That after the consolidation of the said several companies as hereinbefore set out, into the Suburban Electric Company, for the purpose of paying for the said several plants and properties, and for the purpose of enabling it to improve the electric plant acquired by said consolidation, the said Suburban Electric Company issued first mortgage bonds to the amount of $250,000.00, drawing six per cent. interest per annum; that the said bonds were negotiated and placed, and with the money derived from the sale thereof, the said Suburban Electric Company, at great cost and expense to itself, has largely increased the plant acquired by it, by the consolidation of the said companies aforesaid, that said bonds are still outstanding for the full amount of their face value, to-wit:—$250,000.00, and the same are unpaid, that said bonds were secured by a mortgage executed to secure the payment of the principal and interest of the bonds issued as aforesaid and that by the terms of said mortgage, all the property, privileges, rights and franchises, of the said The Suburban Electric Company were pledged and mortgaged to secure the payment of said $250,000.00 bonds, issued as aforesaid, and that among the other rights and privileges passing by said mortgage was the exclusive privilege hereinbefore set out.

6. That the defendant, The City of Covington, is a city of the second class, under provisions of an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act for the government of cities of second class, in the Commonwealth of Kentucky," approved March 19th, 1894, and the defendant William A. Johnson is mayor of said city.

That the defendant, The City of Covington, claims the right under the privileges of its charter to construct and equip a system of electric plant in the city of Covington, for the purpose of furnishing light and power generated by electricity, to the city of Covington and the citizens thereof; and to erect and construct in and through the city of Covington and over the streets

thereof, the necessary electrical plant including engines, dynamos, poles and wires, necessary for the generating and conducting of the electricity throughout the city of Covington, with the right to sell and vend the electricity so generated to the citizens of Covington, for the purpose of lighting and heating.

That the two bodies of the general counsel of the city of Covington, to wit, the board of councilmen and the board of alderman, did, by ordinance, direct the question as to whether or not bonds to the amount of $75,000.00 should be issued for the purpose of the city of Covington's erecting and constructing an electric plant, to be submitted to the vote of the electors of the city of Covington, at an election to be held on the 6th day of November, 1900. The question so submitted to the said electors being as follows:—

"Shall or shall not the general council of the city of Covington issued bonds to the amount of $75,000.00 for the purpose of erecting and constructing an electric light plant to furnish light to the city for use upon its streets and public buildings; the proceeds from the sale of said bonds to constitute seperate and special funds to be known as an electric light fund, and to be devoted exclusively to the erection and construction of an electric light plant; the issuing of said bonds to be in pursuance of authority now vested in the general council by the act of March 19, 1894, creating a charter of the city of Covington, especially by subsection 6 of section 358 (General Statutes) which provides as follows:—to-wit:—

"The general council shall have the power by ordinance through themselves, or others, to provide for the lighting of its streets,
7 public places and buildings, and furnishing light to the inhabitants; to regulate the quality and quantity of the light, and method, time and appliance for furnishing same, etc."

The said ordinance further provided that the mayor of said city should provide for a due submission of the question set out in the first section of the said ordinance to the qualified voters of the city at the then next regular election in November 1900, and to see that the ballots should contain said question, and that said question should be duly submitted to a vote of the people, in such cases made and provided, and to see that the returns of said election on said question are duly made as provided by law in such cases.

7. Your orator further says that the election at which said question was to be submitted to the vote of the electors of said city of Covington, was held on the 6th day of November, 1900, that said question was at said election submitted to the vote of said electors, and that at said election the electors of said city of Covington did note on said question, and it is now claimed by said City of Covington and said mayor of said city, that said vote resulted in favor of the proposition, but your orator denies that two thirds of all the votes at said election or that two-thirds of the votes cast on said proposition at said election were cast in favor of the issuing of said bonds, and denies that said vote was favorable to the issuing of said bonds.

8. That since said election, the general council of said city of Covington, that is to say, the board of councilmen and board of

alderman, passed an ordinance entitled "An ordinance providing for the issuing of bonds to secure a fund for the lighting of the streets and public buildings by electricity, by the city of Covington;" that is to say the said board of councilmen passed said ordinance on November —, 1900, and said board of aldermen, on November 22, 1900,
8 passed said ordinance.

That said ordinance recites that the ordinance theretofore passed, providing for the submission to the voters of the city of Covington of the question of the issuing of bonds, having been submitted to the voters, and having resulted in favor of the issuing of said bonds, and reciting further that the assent of two-thirds of the voters of said city of Covington having been obtained at said election held as aforesaid, for the purpose aforesaid, therefore the issuing of said bonds is ordained, and the mayor of said city of Covington is directed to issue the bonds, and to sign the same, and directing the city treasurer to countersign the same, and the said city clerk to attest the signatures of said mayor and treasurer. And it is further ordained in said ordinance that bids shall be received for the sale of said bonds, and that the funds arising therefrom shall be placed in a fund to be styled "A municipal electric light fund," and the proceeds of said fund to be used for the purpose of supplying the city of Covington and the citizens thereof, with electric lights. That said ordinance has been submitted to the said mayor of said city for his approval and signature, and has been approved by said mayor and said city is now about to issue and sell said bonds and erect said electric light plant, and will do so unless enjoined.

9. That the right and privilege — which the city of Covington claims to issue said bonds, and to erect an electric plant in the said city of Covington, and *when*, unless restrained by an order of this court, it will do, is a violation of your petitioner's exclusive right to erect and maintain poles and wires for the purpose of transmitting heat, light and power, generated by electricity, on and over
9 the streets of the city of Covington, and to sell and vend heat, light and power, generated by electricity, to said city and to the inhabitants thereof.

10. That the exclusive privilege of erecting and maintaining poles and wires, for the purpose of transmitting light and heat by electricity on and over the streets of Covington, and the exclusive privilege of selling and vending the same to the city of Covington, and its citizens, granted by the legislature of the State of Kentucky, to the Covington Electric Company, hereinbefore set out, and acquired by the Suburban Electric Company by its articles of consolidation as aforesaid, constitutes a contract between said Suburban Electric Company and the State of Kentucky; and that the attempt of the defendant, The City of Covington, to erect an electric plant for the purpose of furnishing electric light and power to the city of Covington and the inhabitants thereof, is a violation of section 10, article 1, of the Constitution of the United States, impairing the obligations of contracts and grants existing between the Commonwealth of Kentucky and the said Suburban Electric Company.

11. That on the — day of December, 1899, the Suburban Electric

Company was adjudged a bankrupt in the United States district court, in the district of Kentucky, and on the — day of ——, 1900, your petitioner was duly elected and qualified as trustee of the said Suburban Electric Company in bankruptcy; that your petitioner is now in full possession of all rights, privileges and franchises, owned and controlled by the said The Suburban Electric Company when it was adjudged a bankrupt; that your petitioner is now for and in behalf of the said Suburban Electric Company, and its creditors engaged in the business of furnishing light, heat and power
10 generated by electricity to the city of Covington, and the citizens thereof; that as trustee of the Suburban Electric Company, your orator has possession and control of the poles and wires erected and maintained along and over the streets of Covington, for the purpose of furnishing light, heat and power by electricity; that your orator has and possesses the exclusive right and privilege, in the city of Covington of erecting and maintaining said poles and wires, and of generating electricity, and selling to the city of Covington, aad the citizens and inhabitants thereof, light, heat and power.

Your orator further says that on the — day of ——, 1900, an order was issued from the United States district court in the district of Kentucky, sitting in bankruptcy and directing your orator to sell for the benefit of the creditors all of the Suburban Electric Company's property, rights, and franchises, save only the franchise to be a corporation; that said sale will be had under said order on the 10th day of December, 1900.

That among the most valuable rights held and owned by the said The Suburban Electric Company, and by your orator as trustee of The Suburban Electric Company, to be sold for the benefit of creditors, as aforesaid, was the exclusive privilege granted to The Suburban Electric Company to erect poles and wires over the streets of Covington, and the exclusive right to sell electricity transmitted over said poles and wires to the city of Covington and the citizens thereof.

Your orator further says that if the said city of Covington is permitted to erect an electric light plant system for the purpose of selling and vending light and power generated by electricity to the city of Covington, and to the citizens thereof, the said act will
11 work an irreparable injury to the Suburban Electric Company and to the value of the franchise of the said Suburban Electric Company, and an irreparable injury to the owners and holders of bonds issued by the said Suburban Electric Company, in depriving them of the exclusive privilege held by the said Suburban Electric Company, and by your orator as its trustee in bankruptcy, as aforesaid, and will greatly interfere with the sale of the property rights, privileges and franchises of the said The Suburban Electric Company, to be made under order of this court in bankruptcy, as aforesaid.

Your orator prays that the said city of Covington, and the mayor of said city, and all other officers and agents of said city, may be restrained and enjoined by order of this honorable court from tak-

ing any steps to issue said bonds for the purpose of creating a fund for the erecting of an electric plant system, to furnish light, heat and power to the said city of Covington, and the citizens thereof, and that they may be enjoined from erecting an electric plant system for said purpose, and that said William A. Johnson, mayor of said city, may be restrained and enjoined from signing or issuing said bonds, as by said ordinance he was required to do; and that the rights of the Suburban Electric Company, and your orator's rights as trustee in bankruptcy in the business of said company to furnish light, heat and power to the said city and the citizens thereof, be adjudged an exclusive right against all persons whosoever, including the City of Covington.

Your orator prays that it may have the writ of subpœna issued out of and under the seal of this honorable court, directed to the City of Covington, and to William A. Johnson, the mayor of said city of Covington, to appear before this honorable court and
12 there to answer to this bill of complaint but not under oath, answer under oath being hereby expressly waived; and that also the most gracious writ of injunction may be issued out of and under the seal of this honorable court, enjoining and restraining the said City of Covington, and its mayor, William A. Johnson, from proceeding under the ordinance passed by the general council of the city of Covington, as hereinbefore set out, from issuing bonds for the purpose of providing a fund to erect an electric plant in the said city of Covington, and from erecting said electric plant system.

And your orator prays that it may have such other and further relief as in equity and good conscience your orator is entitled to, and your orator will ever pray.

SIMRAL & GALVIN,
Solicitors for Complainant.

13 UNITED STATES OF AMERICA,
State of Ohio, Hamilton County, } ss:

Charles H. Shaw, being sworn, says that he is the complainant herein, and that he has read the foregoing bill of complaint, and knows the contents thereof; and that the same are true to his knowledge, except as to matters therein stated on information and belief, and those matters he believes to be true.

CHAS. H. SHAW.

Sworn to and subscribed in my presence this 3rd day of December, A. D. 1900.

JOS. C. FINNELL, *Clerk.*

And on the same day, to-wit, on December 3rd, A. D. 1900, a motion for temporary restraining order was filed herein, in words and figures following, to-wit:

United States Circuit Court, District of Kentucky.

CHARLES H. SHAW, Trustee in Bankruptcy, etc., }
vs.
THE CITY OF COVINGTON ET AL. }

Motion for Temporary Restraining Order.

Now comes the complainant and moves the court to cause to be issued a temporary restraining order herein, enjoining the defendants, The City of Covington and William A. Johnson, mayor of said city, from taking steps to issue bonds for the purpose of creating a fund for the erection of an electric plant system, and from erecting an electric plant system, and enjoining the said William A.
14 Johnson, mayor, from signing or issuing said bonds for said purpose, until the further order of the court herein.

SIMRALL & GALVIN,
Attorneys for Complainant.

And on the day following, to-wit; on December 4, A. D. 1900, an entry was made upon the journal of this court clothed in words and figures following, to-wit:

Journal "I," page 53.

This cause coming on to be heard upon the motion of the complainant for a temporary restraining order herein, the court, being advised, grants said motion, and until further order of the court made herein, the City of Covington, its officers and agents, and said William A. Johnson, mayor of said city of Covington, are restrained from taking steps to issue bonds in the sum of $75,000.00, or any other sum, for the purpose of creating a fund for the erecting of an electric plant system to furnish light, heat and power to the said city of Covington, or the citizens thereof, and from erecting or attempting to erect an electric plant system for the purpose of furnishing light, heat and power to the said city of Covington, or the citizens thereof, and the said William A. Johnson, mayor of said city of Covington, is, until further order of this court, restrained from signing or issuing said bonds for said purpose, and the said mayor, and the said City of Covington, its officers and agents, are enjoined, until further order of this court, from selling said bonds for the purpose of providing a fund for the purpose of erecting such electric plant system in the city of Covington.

And the said cause coming on further to be heard upon
15 motion of the complainant for an injunction *pendente lite*, it is ordered that the prayer of the complainant's bill for an injunction should be granted *pendente lite* and it is further ordered that *pendente lite* the said City of Covington, its officers and agents, and the said William A. Johnson, mayor of said city of Covington, are enjoined from taking any steps to issue said bonds for the pur-

pose of providing a fund for erecting an electric plant system in the city of Covington, and from taking any steps to erect an electric plant system for the purpose of supplying the said city of Covington, or its citizens with light, heat and power, and from signing or issuing said bonds for said purpose.

This order to take effect upon the execution by the complainant of a bond in the sum of $10000.00 to the satisfaction of the clerk of this court.

And on a day following, to-wit: on December 8, A. D. 1900, an injunction bond was filed herein, in words and figures following, to-wit:

United States Circuit Court, District of Kentucky.

CHARLES H. SHAW, Trustee, etc., *vs.* THE CITY OF COVINGTON ET AL. } Injunction Bond.

Know all men by these presents, that we, Charles H. Shaw, trustee in bankruptcy of the Suburban Electric Company, a corporation, as principal and National Surety Company as surety, are held and firmly bound unto the above named defendants, The City of
16 Covington and William A. Johnson, mayor of said city of Covington, in the sum of ten thousand dollars to be paid to said defendants, their heirs, executors, administrators, successors and assigns, for the payment whereof well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, administrators and assigns firmly by these presents.

Signed by us this eig-th day of December, 1900.

The condition of the above obligation is such that whereas an order of injunction is about to issue herein by order of court, now, therefore, we, the undersigned, as principal and surety undertake that the plaintiff Charles H. Shaw, trustee in bankruptcy of the Suburban Electric Company, a corporation, will pay to the said defendants such damages as they or either of them may sustain, if it be finally decided that said injunction ought not to have been granted, and if said damages are so paid then this obligation to be void, otherwise to remain in full force and effect.

CHAS. H. SHAW,
Trustee in Bankruptcy of the Suburban Electric Company.
NATIONAL SURETY COMPANY,
By JOHN T. ROUSE, *Res. Vice-Pres't.*

Attest: ROB'T H. THIRTHWALL,
Res. Ass't Sec'y.

17 Afterwards, to-wit, on December 10th, A. D. 1900, a temporary restraining order was issued, clothed in words and figures following, to-wit:

United States Circuit Court, District of Kentucky, at Covington, December Term.

TUESDAY, *December 4th, A. D.* 1900.

CHARLES H. SHAW, Trustee in Bankruptcy of the Suburban Electric Company,
vs.
THE CITY OF COVINGTON and WILLIAM A. JOHNSON, Mayor of the City of Covington.

This cause coming on to be heard upon the motion of the complainant for a temporary restraining order herein, the court, being advised, grants said motion, and until further order of the court made herein, the City of Covington, its officers and agents, and said William A. Johnson, mayor of said city of Covington, are restrained from taking steps to issue bonds in the sum of $75000.00, or any other sum, for the purpose of creating a fund for the erecting of an electric plant system to furnish light, heat and power to the said city of Covington, or the citizens thereof, and from erecting or attempting to erect an electric plant system for the purpose of furnishing light, heat and power to the said city of Covington, or the citizens thereof, and the said William A. Johnson, mayor of said city of Covington, is, until further order of this court, restrained from
18 signing or issuing said bonds for said purpose, and the said mayor, and the said City of Covington, its officers and agents, are enjoined until further order of this court, from selling said bonds for the purpose of providing a fund for the purpose of erecting such electric plant system in the city of Covington.

And the said cause coming on further to be heard upon the motion of the complainant for an injunction *pendente lite*, it is ordered that the prayer of the complainant's bill for an injunction should be granted *pendente lite*, and it is further ordered that *pendente lite* the said City of Covington, its officers and agents, and the said William A. Johnson, mayor of said city of Covington, are enjoined from taking any steps to issue said bonds for the purpose of providing a fund for erecting an electric plant system in the city of Covington and from taking any steps to erect an electric plant system for the purpose of supplying the said city of Covington, or its citizens, with light, heat and power, and from signing or issuing said bonds for said purpose.

This order to take effect upon the execution by the complainant of a bond in the sum of $10000.00, to the satisfaction of the clerk of this court.

UNITED STATES OF AMERICA,
District of Kentucky.

I, Jos. C. Finnell, clerk of the United States circuit court, for the sixth judicial circuit and district of Kentucky, at Covington, do hereby certify that the foregoing is a true and correct copy of an

order made and entered in the case set out in the caption hereto, as the same appears from the records and files of this office.

Witness my hand as clerk and the seal of said court, at Covington, this 10th day of December, A. D. 1900.

[SEAL.] JOS. C. FINNELL, *Clerk.*

19 And on the same day, to-wit, on December 10th, A. D. 1900, said temporary restraining order was returned and filed bearing the following endorsement by the marshal, viz:—

"I hereby certify that I received this writ on the 10th day of December, 1900, and that I personally executed the same on the said defendant The City of Covington by delivering to the mayor W. A. Johnson a true copy of this writ on the 10th day of December, 1900, also to W. A. Johnson, individual, a true copy on the 10th of December, 1900.

A. D. JAMES,
U. S. Marshal,
By J. D. COMPTON, *D. M.*

Afterwards, to-wit: on December, 20th, A. D. 1900, a demurrer to the bill was filed herein, in words and figures following, to-wit:

United States Circuit Court, District of Kentucky.

CHARLES H. SHAW, Trustee, etc.,
vs.
THE CITY OF COVINGTON ET AL.

Demurrer of the City of Covington and W. A. Johnson, mayor of the city, and of each of them to the bill of Charles H. Shaw, trustee in bankruptcy of the Suburban Electric Company.

The defendants and each of them respectively, by protestation, not confessing or acknowledging any or all of the matters and things in the said complainant's bill to be true, in such manner and form as the same are set forth and alleged, do demurrer thereto, and for cause of demurrer show that the said complainant has not, — and by said bill, made or stated any cause, as doth or ought to entitle
20 them to any such relief as is thereby sought or prayed for from and against these defendants.

Wherefore these defendants and each of them, demand the judgement of this court whether they or either of them shall be compelled to make any further answer to the said bill, or any of the matters or things therein contained, and pray to be hence dismissed with their reasonable costs in their behalf sustained.

F. J. HANLON,
Attorney for Defendants.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

F. J. HANLON,
Attorney for Defendants.

DISTRICT OF KENTUCKY, }
County of Kenton. }

William A. Johnson makes solemn oath and says that he is the mayor of the city of Covington, and the chief officer of said named defendant, The City of Covington, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

W. A. JOHNSON.

Subscribed and sworn to before me by the said William A. Johnson, mayor of the city of Covington, this 19th day of December, 1900.

FRED A. HUGERBERG,
N. P., K. Co., Ky.

My commission expires at end of next session of senate.

21 Afterwards, to-wit, on May 15th A. D. 1901, an entry was made upon the journal of this court, in words and figures following, to-wit:

Journal "I," page 103.

This day came the defendants herein, The City of Covington, and William A. Johnson, mayor and filed a plea in abatement, and moved the court that the proceedings herein by complainant be dismissed. The court not being fully advised, takes time and said plea and motion are submitted.

Said plea in abatement, referred to in the foregoing entry, was and is in words and figures following, to-wit:

United States Circuit Court, District of Kentucky.

CHAS. H. SHAW, Trustee, etc., }
vs. }
THE CITY OF COVINGTON ET AL. }

The joint and several plea in abatement of the defendants, City of Covington and William A. Johnson, mayor, to the bill of complaint of Charles H. Shaw, trustee, the above named plaintiff herein.

These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill to be true, in such manner and form as the same are therein set forth and alleged, for plea in abatement to the whole of said bill, come and say that the said Chas. H. Shaw, trustee, of the Suburban Electric Company, ought not to be answered to his bill of complaint herein, because they say that the said Chas. H. Shaw, trustee,
22 of the Suburban Electric Company has been discharged as such trustee, and it having been adjudged here in that the said Suburban Electric Company, is not a bankrupt, and that the order heretofore made herein, on the 13th day of December, 1899

adjudging said The Suburban Electric Company to be a bankrupt, having been vacated and set aside, and held for naught, and the said The Suburban Electric Company having been restored to all its rights, properties and franchises.

All of which matters and things these defendants aver to be true, and state that the said Chas. H. Shaw, trustee, has no further interest in this suit, and they plead said discharge of said Chas. H. Shaw, trustee, aforesaid, and the matters herein contained, to said plaintiff's bill, and pray the judgement of this honorable court whether they should be compelled or ought to be required to make any other or further answer to the said bill of complaint herein, and they pray to be hence dismissed with their costs and charges, in that behalf most wrongfully sustained.

F. J. HANLON,
Counsel for Defendants.

I hereby certify that in my opinion, the foregoing plea is well founded in point of law.

F. J. HANLON,
Of Counsel for Defendants.

DISTRICT OF KENTUCKY, }
County of Kenton, } ss:

William A. Johnson being duly sworn, deposes and says he is one of the above named defendants, and that the foregoing plea is true in point of fact, and is not interposed for delay.

23 W. A. JOHNSON.

Subscribed and sworn to before me this 13th day of May, 1901.

F. A. HUGENBERG,
N. P. in and for Kenton Co., Ky.

Afterwards, to-wit: on May 16th., A. D. 1901, an entry was made upon the journal of this court, clothed in words and figures following, to-wit:

Journal "I," page 106.

This cause coming on to be heard upon the plea in abatement and motion to dismiss, the court being now fully advised, denies, said plea and overrules said motion, to which ruling of the court defendants by counsel, come and except.

And on the same day, to-wit: on May 16th., A. D. 1901, an entry was made upon the journal of this court, clothed in words and figures following, to-wit:

Journal "I," page 106.

This cause coming on to be heard upon the demurrer of defendants to the bill of complaint herein, the court now being fully advised, overrules same, to which ruling of the court defendants by counsel come and except.

And on the same day, to-wit: on May 16th., A. D. 1901 an entry was made upon the journal of this court, clothed in words and figures following, to-wit:—

24 Journal "I," page 106.

On the motion of the Union Light, Heat & Power Company to be made a party hereto, and for leave to file its bill in the nature of a supplemental bill, all parties having due notice and being in court, said motion is granted. Said Union, Light Heat & Power Co., is made a party complainant herein, and leave is granted to file said bill and the same is now filed and the injunction heretofore granted herein is continued in force in behalf of said Union Light, Heat & Power Company.

Said motion for leave to file bill in nature of supplemental bill referred to in the foregoing entry was and is in words and figures following, to-wit:

United States Circuit Court, District of Kentucky.

CHAS. H. SHAW, Trustee, etc.,
vs.
THE CITY OF COVINGTON ET AL.

Motion of the Union Light, Heat & Power Company for Leave to File Bill in the Nature of Supplemental Bill.

To the honorable judges of the United States circuit court for the district of Kentucky:

Now comes the Union Light Heat & Power Company, a corporation, and moves the court for leave to file bill in nature of supplemental bill, and to become a party complainant herein, on the ground that since the filing of said suit, it has acquired the rights of the complainant herein, which are the subject of his bill
25 in equity.

THE UNION LIGHT, HEAT & POWER CO.,
By ERNST & CASSATT, *Counsel.*

Said supplemental bill of Union Light, Heat & Power Company referred to in the foregoing entry was and is in words and figures following, to-wit:

United States Circuit Court, District of Kentucky.

CHAS. H. SHAW, Trustee, etc., }
vs.
THE CITY OF COVINGTON ET AL. }

Bill in the Nature of Supplemental Bill of the Union Light, Heat & Power Company, a Corporation.

To the honorable judges of the circuit court of the United States, district of Kentucky:

Your orator, The Union Light, Heat & Power Company, by leave of court first had, files this, its bill in the nature of supplemental bill in the above entitled cause against the parties thereto, and says:

That it is a corporation created and existing under the laws of the State of Kentucky, that heretofore, to-wit: on or about the 10th day of April, 1900, Charles H. Shaw, trustee in bankruptcy, of the Suburban Electric Company, a corporation, filed his bill of complaint herein, setting forth that the Suburban Electric Company was the owner of an exclusive privilege to enter in and upon the streets and public places of the city of Covington, and there
26 lay its pipes and mains, and there erect its poles, wires and posts, through or along any streets or highway of the city of Covington, or adjacent thereto, as it might see fit, and generate and supply to the city of Covington and its inhabitants, persons and corporations, located in and near said city, light and motive power generated by electricity and to supply light, power or heat generated by electricity to the city of Covington and such individuals and corporations, contracting with each for such prices and compensation as might be agreed upon by said company and such individuals and corporations, and the exclusive privilege of conducting the business as before described, within and adjacent to said city for the term of twenty-five years from the — day of April, 1882;

That the said Suburban Electric Company was adjudged a bankrupt in the United States district court, in the district of Kentucky on the — day of December, 1899, and that on the — day of ——, 1900, said complainant was duly elected and qualified as said trustee of said Suburban Electric Company, in bankruptcy, and at the time of the filing of said suit was in possession of all the rights, privileges and franchises owned and controlled by the said Suburban Electric Company, and was engaged in the business of furnishing light, heat and power generated by electricity to the city of Covington and the citizens thereof, and was in exclusive possession, control and ownership of said exclusive privilege hereinbefore referred to, all of which is fully set forth in said bill;

And thereby praying that the said City of Covington, and said Johnson, its mayor, might be restrained and enjoined from taking any steps to issue said bonds on behalf of said city of Covington for

the erection of an electric light plant by said city of Covington, all as set forth in the bill filed herein:

27 And your orator further shows that a writ of subpœna issued out of and under the seal of this honorable court, to the defendants in said bill, and that pending final determination of said cause, a preliminary injunction and restraining order was granted enjoining said defendants as prayed for in said bill:

And your orator further shows that since the filing of said bill and the granting of said injunction and preliminary restraining order, as aforesaid, the said complainant, trustee in bankruptcy, has been discharged, and all the property, rights and franchises of said The Suburban Electric Company have been restored to it; that

Thereafter on the same day said Suburban Electric Company sold, assigned and transferred said exclusive privilege above described, to the North American Company, a corporation organized and existing under the laws of New Jersey: that, thereafter, on the same day, the said North American Company sold, assigned and transferred to your orator, The Union Light, Heat and Power Company, the said exclusive privilege hereinbefore described, and that your orator is now the owner of said exclusive privilege and in possession and control of the same:

Your orator further shows, that by virtue of being the owner of said exclusive privilege, and being in full control and possession of the same, it is entitled, in its behalf, to the relief prayed for by said complainant in said bill.

To the end, therefore, that said defendants may be enjoined as prayed for in said bill, and that the preliminary injunction and restraining order hereinbefore granted, shall be continued in force in your orator's behalf, pending a final hearing of this cause:

28 May it please your honor, to grant unto your orator a writ of subpœna directed to the said Charles H. Shaw, trustee in bankruptcy, as aforesaid, the said City of Covington, and William A. Johnson, mayor of the city of Covington, commanding them, at a suitable time and place, to appear before your honor and make answer and promise to abide by and perform such decree as to your honor shall seem meet.

THE UNION LIGHT, HEAT & POWER CO.
ERNST & CASSATT, *Counsel.*

Afterwards, to-wit: on May 17th, A. D. 1901, came the defendants by their attorney and filed special demurrer to jurisdiction, clothed in words and figures following, to-wit:

United States Circuit Court, District of Kentucky.

CHAS. H. SHAW, Trustee, etc.,
vs.
THE CITY OF COVINGTON ET AL.

To the honorable judges of the circuit court of the United States for the district of Kentucky:

The demurrer of the above named defendant, City of Covington, and William A. Johnson, mayor, to the bill of complaint of the above named plaintiff for want of jurisdiction.

These defendants and each of them, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained, to be true, in such manner and
29 form as the same are therein set forth, and alleged jointly demurr to said bill, and for cause of demurrer show:

That it appeareth from the plaintiff's own showing herein that this honorable court has no jurisdiction of this suit, in consequence of the trustee having been discharged herein, and the order heretofore made adjudging the Suburban Electric Company to be a bankrupt, having been vacated, set aside and held for naught, and it appearing that the said Suburban Electric Company has been restored to all its rights, properties and franchises, so far as they were affected by said entry adjudging said company to be a bankrupt herein, and it appearing by the plaintiff's own showing by the said bill, and the record herein, that he is not entitled to the relief prayed for by said bill, against these defendants or either of them.

Wherefore and for divers other good causes, of demurrer appearing in the said bill, these defendants do demurr thereto. And they pray the judgement of this court whether they or either of them shall be compelled to make any answer to said bill and they humbly pray to be hence dismissed, with their reasonable costs in this behalf sustained.

F. J. HANLON,
Solicitor for Defendants.

I hereby certify that the foregoing demurrer is in my opinion, well founded in point of law.

F. J. HANLON,
Counsel for Defendant.

DISTRICT OF KENTUCKY, } *ss:*
County of Kenton, }

William A. Johnson, makes solemn oath and says that he is one of the above named defendants and mayor of the City of
30 Covington, one of the above named defendants herein, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

W. A. JOHNSON.

Subscribed and sworn to before me this 13th day of May, 1901.

F. A. HUGENBERG,
N. P. in and for Kenton Co., Ky.

And on the same day, to-wit, on May 17th, A. D. 1901, came the defendants by their attorney and filed demurrer to supplemental bill, clothed in words and figures following, to-wit:

United States Circuit Court, District of Kentucky.

CHAS. H. SHAW, Trustee, etc.,
vs.
THE CITY OF COVINGTON ET AL.

To the honorable judges of the circuit court of the United States for the district of Kentucky:

The demurrer of the respondents, The City of Covington and William A. Johnson, mayor, to the supplemental bill of complaint filed by the Union Light, Heat and Power Company May 16th, 1901.

These defendants respectively, by protestation not confessing or acknowledging all or any of the matter and things in the supplemental bill of the Union Light, Heat and Power Company, filed herein on May 16th, 1901, to be true, in such manner and form as the same are therein set forth and alleged, do*th* demur thereto,
31 and for cause of demurrer show*eth* that the said complainant has not in and by the said supplemental bill, made or stated any such cause as doth, or ought to entitle it to any such recovery or relief as is thereby sought, and prayed for from or against these defendants.

2. Because said supplemental bill does not show on its face, any divers- citizenship between the parties complainant and defendant.

3. Because said bill does not show on its face that the action is one arising under the Constitution or laws of the United States.

Wherefore, these defendants demand the judgement of this honorable court whether they shall be compelled to make any further answer to the supplemental bill, or to any of the matters and things therein contained, and pray*s* to be hence dismissed, with their reasonable costs in this behalf sustained.

F. J. HANLON,
Solicitors for Defendants.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

F. J. HANLON,
Solicitor for Defendants.

DISTRICT OF KENTUCKY, *County of Kenton,* } *ss:*

William A. Johnson makes solemn oath, and says that he is one of the above-named defendants and mayor of the city of Covington

and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

W. A. JOHNSON.

Subscribed and sworn to before me this 16th day of May, A. D. 1901.

F. A HUGENBERG,
N. P. in and for Kenton Co., Ky.

32 And on the same day, to-wit: on May 17th, A. D. 1901, came the defendants by their attorney, and filed their answer herein, in words and figures following, to wit:

United States Circuit Court, Eastern District of Kentucky.

CHARLES H. SHAW, Trustee, etc.,
vs.
THE CITY OF COVINGTON ET AL.

The joint and several answers of the City of Covington and William A. Johnson, mayor of the city of Covington, to the bill of complaint of Chas. H. Shaw, trustee in bankruptcy of the Suburban Electric Company.

To the honorable judges of the circuit court of the United States, and the district of Kentucky:

Your respondents, for answer herein, respectfully say:

That now, and at all times hereafter, not waiving the demurrer filed herein by them to the bill of complaint on the — day of ——, but expressly relying upon the same, and saving to themselves all, and all manner of benefit of exception or otherwise, that can or may be taken to the many errors, uncertainties and imperfections in the said bill contained: for answer thereto, or to so much thereof, as these defendants are advised it is material or necessary for them to make answer to, answering say:—

1. That it is true that the Covington Electric Light Company was a corporation created and existing under the laws of the Commonwealth of Kentucky, and that it becomes such by an act of
33 the General Assembly of the Commonwealth of Kentucky, approved April 22nd, 1882, said act providing in part as follows: to wit:—"Said company shall have the privilege subject to the regulations of the city authorities to lay its pipes and mains; to erect its poles, posts and wires through and along any street or highway in the city aforesaid or adjacent thereto as it may see fit.

Provided:— It in no way permanently obstructs the use of same to the public or any individual; and it is hereby required to place and put in repair any street or highway through which its line of pipes, wires etc., may pass." Also

"That the business of said company is limited to furnishing and supplying the city of Covington and its inhabitants and persons and corporations located near said city with light and motive power

generated by electricity, steam or other artificial means, or to the furnishing or supplying either said light, power or heat, and may charge therefor such price and compensation as may be agreed upon between said company and the individual or corporation contracting with it: and in the aid of its object, it may acquire and hold such real estate as may be necessary for the location of its works and the carrying into effect the purposes of its organization; and the body hereby incorporated shall have the exclusive privilege of conducting the business above described within and adjacent to said city, for the term of twenty-five years, but the non-user of the privilege of this act of incorporation for five years shall work a forfeiture."

Respondents say that in pursuance of said authority in said act provided, the city of Covington did by ordinance approved
34 June 21st, 1883, and by an amended ordinance approved July 3, 1884, undertake to and did regulate and prescribe the terms upon which the streets, alleys, avenues and public grounds of the city of Covington, Kentucky, may be used by complainant, and other companies or individuals engaged in the business of furnishing light by means of electricity, and in pursuance of same, and with said authority, the general council of the city of Covington, passed an ordinance entitled "An ordinance prescribing the terms upon which streets, alleys avenues and public grounds of the city of Covington, Kentucky, may be used by incorporated companies, firms or individuals, engaged in the business of furnishing light by means of electricity," which ordinance was approved by the mayor of said city on June 21, 1883, and provided in part as follows, to-wit:

"Any incorporated company, firm or individual operating under this ordinance, shall, at their own expense, and in a manner to be approved by the said committee on internal improvements restore to their former condition any streets, alleys, avenues or public grounds, or squares that may be taken up excavated or obstructed, in any way by the erection of poles or masts, or the laying of underground pipes; and all such excavating made necessary by the erection of poles or masts, or the laying of underground pipes shall be made under the supervision of, and subject to the control of the said committee on internal improvements," and also that, "When any incorporated company, firm or individual shall wish to operate under the provisions of this ordinance, it or they shall make a written application to the city council stating their desire to operate under this ordinance, and the time for which they desire to operate, not exceeding twenty-five years: and shall accompany said written application by a bond in the
35 penal sum of twenty thousand dollars, with good and sufficient security, conditional to keep and perform all the terms and conditions of this ordinance, and to comply with all the rules and regulations herein provided and to save the city harmless from all loss, costs, damages, fees, and expenses, of every kind, the said city may sustain or be put to in any manner, by reason of the grant of the privileges herein provided for, or by reason of the failure of

the incorporated company to comply with the terms, provisions, conditions, stipulations and regulations of this ordinance, or any one or more of them, and if the said council are then satisfied, permission shall be granted to said incorporated company, firm or individual, and if the bond presented shall be satisfactory to said council, the said council shall approve said bond and shall be ordinance or resolution grant permission to said applicant to operate under the provisions of this ordinance."

Respondents further say that in pursuance of said authority given to said city, by said act aforesaid, to regulate and perscribe the conditions upon which complainant could enter in and upon the streets, alleys, highways and so forth of said city of Covington, the general council of said city of Covington, did on July 3, 1884, pass an amended ordinance entitled "An ordinance to amend an ordinance passed June 21, 1883, entitled: "An ordinance perscribing the terms upon which streets, alleys, avenues, and public grounds may be used by incorporated companies, firms or individuals engaged in the business of furnishing light by means of electricity," and said ordinance provides in part as follows, to-wit: "The bond to be given by any such company, firm or individual shall be in the sum of $20,000.00, as provided in said original ordinance
36 to which this is an amendment, and in addition to the conditions, stipulations and provisions to be contained in said bond, as provided in said original ordinance, the said bond shall contain the further conditions that the said company firm or individual, accept the provisions of this ordinance as now amended, and shall restore to their former condition and put in good repair at his or their expense any street, alley, avenue, or highway, public grounds or squares that may be taken up, excavated or obstructed in any way by the laying of said pipes, mains or other conduits, under said streets, alleys, highways, etc., and that it will pay to the city any damages, costs or expenses said city may incur, sustain or be compelled to pay by reason of the taking up, excavation or obstruction of any said streets, alleys, avenues, highways etc., in the laying of said pipes, mains or conduits."

A certified copy of said ordinance is filed herewith as part hereof marked, Exhibit- "A" & "B."

Respondents say that said act, ordinance and amended ordinance aforesaid, perscribed the terms and conditions upon which the streets, alleys, avenues, and public places of the city of Covington might be used by incorporated companies firms or individuals, engaged in the business of furnishing light by means of electricity, and that by the terms of said ordinance aforesaid, it was provided that any firm, individual or corporation that undertook to engaged in the business of furnishing light by means of electricity in the city of Covington should give bond in the sum of $20,000.00, conditioned as in said ordinance provided and should erect its poles and string its wires as by said ordinance, provided. And respondents say that said Covington Electric Light Company or the
37 Suburban Electric Company never complied with said ordinances in any way whatever, and were and always have been

trespassers in the city of Covington, and that said Covington Electric Light Company nor the Suburban Electric Company never did have any right or permission whatsoever, and hath not now any right whatsoever, to use the streets or other public places in the city of Covington, for the purpose of erecting poles, or stringing wires, or of operating said plant. Respondents say that the said Suburban Electric Illuminating Heating and Power Company of Newport, Kentucky, one of the constituent corporations consolidated under the name of the Suburban Electric Company was incorporated by an act of the General Assembly of Kentucky, approved on the — day of —— 1899, and its business was confined to the supplying *to* the city of Newport and its inhabitants and other persons, etc., with light, heat and power by the electric current; and that the Citizens Electric Light Company, another one of the constituent corporations consolidated under the name of the Suburban Electric Company was incorporated by an act of the General Assembly of the Commonwealth of Kentucky, approved April 17th, 1890, its business being to furnish electricity, etc., to the city of Dayton in Campbell county, Kentucky. Respondents say that on the 11th day of April, 1894, the three above mentioned electric companies were consolidated under the general law of Kentucky, under the name of the Suburban Electric Company, said later company attempting to retain all the rights and privileges granted in each of the charters of said three constituent companies. Respondents say that neither of said constituent companies, nor said consolidated company the Suburban Electric Company, have ever in any way *ever* complied with said ordinances of the city of Covington, regulating the
38 terms and the manner upon which poles, and posts might be erected and wires strung in said city, and never did obtain permission from the city of Covington, to enter in and upon its streets and public highways of said city, and that said ordinances are still in force and *hath* never been repealed: and respondents say that said Suburban Electric Company, hath never acquired the right to engage in business in the city of Covington.

Respondents respectively plead the act and several ordinances aforesaid in bar of plaintiff's right to any relief herein and pray the judgment of this honorable court thereon.

5. Respondents for further answer herein deny that the Suburban Electric Company is a corporation created or existing by consolidation, under the provisions of the general law of the Commonwealth of Kentucky, of the Covington Electric Company of Covington, Kentucky, of the Suburban Electric Illuminating Heating & Power Company of Newport, Kentucky, or the Citizens Electric Light Company of Dayton, Kentucky. Respondents admit and say it is true that all of said constituent companies were corporations organized under the special acts of the General Assembly of the Commonwealth of Kentucky, but deny that at the time of the consolidation thereof, into the Suburban Electric Company, the constituent companies were each of them engaged in the carrying on of electric lighting or heating business; deny the Covington Electric Company of Covington, Kentucky, was engaged in said business in the city of Covington,

Kentucky; deny the Suburban Electric Illuminating Heating & Power Company was engaged in said carrying on of said business in Newport, Kentucky; deny the Citizens Electric Light Company of Dayton, Kentucky, was engaged in the carrying on of said business in the city of Dayton, Kentucky, or each of said companies owning or possessing their special corporate rights or franchises, or the electric plant, necessary to enable it to carry on its business aforesaid.

6. Respondents deny that the said several constituent corporations or the stockholders thereof, duly entered into the articles of consolidation which they each, of date April 11, 1894, subscribed to. Deny the stockholders in person or the corporations of either of them, by their respective secretaries or presidents, also affixed the seal of their respective corporation.

7. Respondents, respectively, deny, that by the terms of said articles of consolidation or the laws of the State of Kentucky, the said consolidated company the Suburban Electric Company, succeeded to or retained each or all of the property franchises, licenses, privileges, business, credits, assets, or effects granted or owned by each of the constituent companies by the several acts of the legislature of the city incorporating them, or otherwise acquired by them, or being bound for all contracts, liabilities and obligations of each of the said constituent companies.

8. Respondents respectively admit and say it is true that the Coving-on Electric Light Company was created by an act of the General Assembly of the Commonwealth of Kentucky, in April, 1882, as set out in complainant's bill herein, but deny that by said act said Covington Electric *Electric* Light Company was authorized and empowered to enter in or upon the streets or public places of the city of Covington, or therein lay its pipes or mains, or therein erect its poles or posts or wires through or along any street or highway in the city of Covington, or adjacent thereto, as it may see fit, or to generate or supply to the city of Covington or its inhabitants or persons or corporations located in or near said city, light or motive power generated by electricity, or to supply light or power or heat generated by electricity to the city of Covington, or such individual or corporation contracting with it for such price or compensation as may be agreed upon between said company or said individual or corporation: deny that said articles of incorporation further granted to the said Covington Electric Light Company the exclusive privilege of conducting the business as above described therein or adjacent to said city for the term of twenty-five years.

9. Respondents respectively say that the exclusive right claimed and asserted by the complainant herein, to furnish light to the citizens of Covington and the city of Covington, is illegal, repugnant to, inconsistent and contrary to law and to the provisions of the third constitution of the State of Kentucky, adopted on the 11th., day of June, 1850, and which constitution was in full force and effect, at the time said alleged and exclusive franchise was granted

to the said Covington Electric Light Company in 1882. Article three of said constitution provides as follows, to-wit:—

"That all free men when they form a social compact, are equal, and that no man or set of men are entitled to exclusive seperate, public emoluments or privileges, from the community but in consideration of public services."

Respondents respectively state that said exclusive right asserted by the complainant herein to furnish electric light to the city of Covington, for use upon its streets and public buildings is illegal, repugnant to, inconsistent and contrary to law, and to public policy, and the present constitution of the State of Kentucky, adopted at Frankfort, Kentucky, on the 28th day of September, 1891, in this:—

That by section three of the bill of rights of said constitution it is provided "that all men when they form a social compact
41 are equal, and no grant of exclusive, seperate, public emoluments or privileges shall be made to any man or set of men except in consideration of public services; and every grant of a franchise, privilege or exemption shall remain subject to revocation, alternation and amendment."

Respondents say that the said constitution was in full force and effect at the time and before the alleged consolidation of the aforesaid constituent corporations, by and under the name of the Suburban Electric Company, and they rely and depend upon said provisions of the constitution in bar of complainant's right to any relief herein.

10. Respondents say that by an act of the legislature of Kentucky, approved February 14, 1856, entitled "An act reserving power to amend or repeal charters and other laws," it is provided in part as follows, to-wit:—

"That all charters and grants of or to coporations or amendments thereof, and all other statutes shall be subject to amendment or repeal, at the will of the legislature, unless a contrary intent be therein plainly expressed; and that the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter."

They say said act was in full force and effect and had not been repealed or modified at the time of the alleged exclusive grant to the Covington Electric Light Company was made, and granted to said company as set forth in complainant's bill on the — day of —— 1882, and that said act was in full force and effect and had not been repealed, modified or amended at the time of the alleged consolidation of the several constituent corporations by and under the name of the Suburban Electric Company of April 11th, 1894, and respondencts say that said act and acts aforesaid, are still in full force
42 and effect and have not been repealed or modified, and they say that there was no such contrary intent expressed or reserved in the charter creating the Covington Electric Light Company, and "that the immunities and privileges granted thereunder and by virtue thereof, should not be subject to amendment, alteration or repeal at the will of the legislature;" and they say that in the articles of incorporation creating the alleged Suburban Electric Company, there was not and is no such intention therein expressed

"that the immunities and privileges therein granted should not be subject to amendment modification, alteration or repeal at the will of the legislature of Kentucky."

11. Respondents further say that in conformity with section three of the constitution aforesaid, the legislature of Kentucky did on May 16th, 1893 pass an act which provides in part as follows:—

"All charters and grants of or to corporations *are* amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes shall be subject to repeal at, the will of the General Assembly, unless a contrary intent be therein plainly expressed." They say that the provisions of said act and section three of the constitution aforesaid, were in full force and effect before the alleged consolidation of the several constituent corporations by and under the name of the Suburban Electric Company took place, to-wit:— on the 11th day of April, 1894, and are still in full force and effect and have not been repealed or modified or amended. Respondents plead and rely upon the aforesaid provisions of the constitution of the State of Kentucky and the said several acts aforesaid of the General Assembly of the Commonwealth of Kentucky in the bar
43 of complainant's right to any relief prayed for in said bill of complain herein against these defendants, or either of them.

12. Respondents deny that the said Covington Electric Light Company, in pursuance to the exclusive privilege granted to it by its said articles of incorporation, did on the — day of ——, 1884, or at any other time enter in or upon the streets of the city of Covington, or erect thereon its poles or wires, or constructed in said city at great expense to it, a large or expensive electric light plant for the purpose of generating electric light, or power or heat in pursuance of the power conferred upon it by its said articles of incorporation or commenced or continued to supply the city of Covington or the citizens thereof with electric light or electric power generated through the plant so constructed by it, or carried or furnished to the sonsumers thereof, over or by means of the poles or wires constructed by it through the streets of Covington, as aforesaid; deny that said Covington Electric Company was at the time of its consolidation into the Suburban Electric Company or at any other time as hereinbefore set out, in full possession of the business being conducted by it as aforesaid, or by said consolidation, of the rights, privileges or properties owned by the said Covington Electric Light Company, including the exclusive privilege hereinbefore set out, passed to or become the property of the Suburban Electric Company, and respondents say that the exclusive power to construct and bargain and contract for lighting the city of Covington, with electric light, or otherwise was vested in the city of Covington, by an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to amend and reduce into one the several acts concerning
44 the city of Covington" approved March 2, 1850, and which act provided in part as follows, to-wit:—

"The general council shall have the exclusive power to construct and bargain and contract for the construction of gas and water works, within the city and pass all necessary ordinances to regulate

the same, and provide for lighting the city with oil or gas or otherwise, and for furnishing it with water." Respondents respectively say that by the terms and provisions of the act of April 22, 1882, creating the Covington Electric Light Company as hereinbefore set out, it is provided "that the body hereby incorporated shall have the exclusive privilege of conducting the business above described within and adjacent to said city, for the term of twenty-five years, but a non-user of the privilege of this act of incorporation for five years shall work a forfeiture." Respondents respectively allege and charge "that the alleged Covington Electric Light Company did not use or take advantage of the privilege granted by said act aforesaid, creating such corporation and that such corporation did not commence operation under the privileges granted by said act within five years from the time said corporation was created on April 22, 1882, or at any other time thereafter.

13. Respondents respectively allege that by the terms of said mortgage given to secure the payment of the $250,000.00, in bonds issued by said Suburban Electric Company, all the property privileges, rights or franchises of the said Suburban Electric Company were pledged or mortgaged to secure the payment of the said $250,000.00 bonds as aforesaid; deny that among the other rights or privileges passing by said mortgage was the exclusive privilege hereinbefore set out.

14. Respondents respectively say that it is true that the
45 city of Covington, is a city of the second class in the State of Kentucky, organized under an act of the legislature approved March 19, 1894, and the defendant William A. Johnson is the mayor of said city as set forth in complainant's bill.

15. Respondents respectively say that it is true the defendant City of Covington, claims the right and privilege under its charter to construct and equip a system of electric plants in the city of Covington, for the purpose of furnishing light and power generated by electricity to the city of Covington, and the citizens thereof, and to erect and construct in and through the city of Covington, and over the streets thereof, the necessary apparatus including poles, and wires, etc., for the generating and conducting of the electricity through the city of Covington, but they deny that *they* the defendant The City of Covington, claims or is claiming the right under the privileges of its charter to sell or vend the electricity so generated to the citizens of Covington, for the purpose of lighting or heating, and they say that the said city of Covington desires only to erect an electric plant to be known as "a municipal electric light plant" for the purpose of lighting the streets and the public buildings of the city, and not to engage in said business for profit or for the purpose of furnishing electric light to private consumers.

16. Respondents respectively admit and say it is true that the two bodies of the general council, to-wit, the board of councilmen and the board of aldermen did by ordinance approved by the mayor of the — day of ——, 1900, direct the question "As to whether
46 or not bonds to the amount of $75,000 should be issued for the purpose of the city of Covington erecting and construct-

ing an electric plant," to be submitted to the vote of the electors of the city of Covington, at an election to be held on the 6th day of November, 1900, and they admit that the question so submitted to the electors is the same as set out in complainant's bill herein.

17. Respondents, respectively, state, and say it is true, that the election at which said question was to be submitted to the vote of the electors of the city of Covington, was held on the 6th day of November, 1900, and that said question was at said election submitted to the vote of said electors; and they say that it is true that said vote resulted in favor of the proposition. Respondents say that upon the question submitted to said voters at said election, to wit: "Are you in favor of the city of Covington issuing $75,000.00 in bonds for the erection of a city electric light plant, to light the streets and public buildings," which question was submitted to the voters of the city on the 6th day of November, 1900, 2712 votes were cast in the affirmative and in favor of said bond issue, and 1176 votes were cast in the negative against said bond issue; and that two-thirds of the electors voting on said proposition, voted in favor of same.

They say that the election commissioners in and for Kenton county, consisting of J. L. Elliston, Henry Kokenge, and William Riedlin, canvassed the returns of said election, and certified that the above vote was cast for and against said proposition, and that said certification was made by said election commissioners to the city clerk of Covington, Kentucky, (a certified copy of said certification
47 and report of said election commissioners is filed herewith as part hereof marked Exhibit "C."

18. Respondents respectively admit, that the general council of the city of Covington, passed an ordinance providing for the issuing of said bonds to secure a fund to be taken as "the mutual electric light fund" for the lighting of the streets and public buildings by electricity, by the city of Covington, as set forth by the complainant in his bill of complaint herein, and that the same was duly signed by the mayor and approved. Respondents say that by an act of the legislature of Kentucky, approved March 19, 1894, authority was delegated to the cities of the second class of which the city of Covington is one, to provide by itself or through others, for lighting its streets and public buildings, as follows:—"The general council shall have power by ordinance, to provide by themselves or through others for lighting the streets, public places and buildings, and furnishing light to the inhabitants, and to regulate the quality and quantity of the light, and the method, time of and appliances for furnishing the same. To compel any and all light companies or persons furnishing light, to change and relocate gas mains, or pipes or poles, electric wires and conduits for electric wires, to place those above the surface of the ground under it, to change the method of conveying the light, and generally to do things conducing to the safety and comfort of the inhabitants in the premises."

19. Respondents respectively deny that the right or privilege which the city of Covington claims to issue bonds or to erect an

electric plant in the said city of Covington, or which unless
48 restrained by an order of this court it will do, is a violation of your petitioner's exclusive right to erect or maintain poles or wires for the purpose of transmitting heat, light or power generated by electricity on or over the streets of the city of Covington, or to sell or vend heat light or power generated by electricity in said city or to inhabitants thereof.

20. Respondents respectively deny, that the exclusive privilege of erecting or maintaining poles or wires for the purpose of transmitting light, heat or power by electricity on or over the streets of Covington, or the exclusive privilege of selling or vending the same, to the city of Covington, or its citizens granted by the legislature of the State of Kentucky to the Covington Electric Light Company, hereinbefore set out or acquired by the Suburban Electric Company by its articles of consolidation as aforesaid, constitutes a contract between the Suburban Electric Company, and the State of Kentucky; deny that the attempt of the defendant City of Covington to erect an electric light plant, for the purpose of furnishing electric light, or power, to the city of Covington or the inhabitants thereof, is a violation of section 10, article 1, of the Constitution of the United States, impairing the obligations of contracts or grants existing between the Commonwealth of Kentucky, or the said Suburban Electric Company.

Respondents respectively deny that your petitioner is now in full possession of all rights or privileges or franchises owned or controlled by the said Suburban Electric Company, when it was adjudged a bankrupt; deny that your petitioner is now, for or in behalf of the said Suburban Electric Company or its creditors,
49 engaged in the business of furnishing light heat or power generated by electricity to the city of Covington or the citizens thereof; deny that as trustee of the Suburban Electric Company, your orator, has possession or control of the poles or wires erected or maintained along or over the streets of Covington, for the purpose of furnishing light or heat or power by electricity; deny that your orator has the exclusive right or privilege in the city of Covington, of erecting or maintaining said poles or wires or of generating electricity or selling to the city of Covington, or to the citizens and inhabitants thereof, light, heat or power; they deny that said sale will be or was had on the 10th day of December, 1900.

22. Respondents respectively deny, that among the most valuable rights held or owned by the Suburban Electric Company or by your orator as trustee of the Suburban Electric Company to be sold for the benefit of creditors as aforesaid, was the exclusive privilege granted to the Suburban Electric Company to erect poles or wires, over the streets of Covington or the exclusive right to sell electricity transmitted over said poles or wires to the city of Covington, or the citizens thereof.

23. Respondents respectively deny that if the said city of Covington is permitted to erect an electric light plant system, for the purpose of selling or vending light or power generated by electricity to the city of Covington, or the citizens thereof, the said act will work

an irreparable injury to the Suburban Electric Company, or to the value of the franchise of the said Suburban Electric Company, or an irreparable injury to the owners or holders of bonds issued by the said Suburban Electric Company, in depriving them of the exclusive privilege held by the Suburban Electric Company, or by your
50 orator, as its trustee in bankruptcy as aforesaid, or will greatly interfere with the sale of the property, rights or privileges or franchises, of the said Suburban Electric Company to be made under order of this court, in bankruptcy as aforesaid.

Wherefore the respondents respectively *have* fully answered confessed, traversed and avoided or denied all the matters in the said bill of complaint, material to be answered, according to their best knowledge and belief, humbly pray*s* this honorable court to enter its decree that these respondents respectively be hence dismissed. That the temporary restraining order granted by this honorable court on December 4, 1900, "restraining these defendants respectively from taking any steps to issue bonds in the sum of $75,000.00 or any other sum, for the purpose of creating a fund for the erection of a municipal electric light plant, to light the public streets and public buildings of the city of Covington," be dissolved and set aside; and that the injunction granted by this honorable court *pendente lite*, "enjoining these defendants respectively from taking any steps to issue said bonds for the purpose of providing a fund for erecting an electric plant system in the city of Covington, and enjoining said respondents respectively from taking any step to erect an electric plant system for the purpose of lighting the public streets and public buildings with electric light, and enjoining these respondents respectively from signing or issuing said $75,000.00 in bonds for said purpose" be dissolved, and that all orders heretofore made in the premises be vacated and set aside, that the bill of complaint herein be dismissed, and that these defendants respectively be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained, and for such further and
51 other relief in the premises, as to this honorable court may seem meet and in accordance with equity.

F. J. HANLON,
City Solicitor for Respondents.

And on the same day, to-wit; on May 17th, A. D. 1901, came the defendants by their attorney and filed their amended answer herein, in words and figures following, to-wit:—

CHAS. H. SHAW, Trustee, etc., Plaintiff,
vs.
THE CITY OF COVINGTON ET AL., Defendants.

To the honorable judges of the circuit court of the United States for the eastern district of Kentucky:

Amended answer of the respondents City of Covington and W. A. Johnson, mayor, to the supplemental bill of complaint filed herein by the Union Light, Heat and Power Company on the 16th day of May, 1901.

These defendants respectively now and at all times hereafter, saving to themselves all and all manner of benefit of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties, and imperfections, in the original bill filed herein, and this supplemental bill, and reiterating each and every allegation made in their original answer herein, and not waiving their demurrer, and plea in abatement filed herein, to said original bill, and this supplemental bill but expressly relying upon the same, for amended answer hereto, or to *such* much hereof, as these defendants are advised it is *or* necessary for them to make answer to, answering, den*ies*,
52 that at any time *of* the filing of said suit, said Chas. H. Shaw, trustee, was in possession of all the rights, privileges or franchises, owned or controlled by the said, The Suburban Electric Company or was engaged in the business of furnishing light heat or power generated by electricity to the city of Covington or the citizens thereof; den*ies* he was as such trustee of the Suburban Electric Co., in exclusive possession or control or ownership of said exclusive privilege hereinbefore referred to all of which is fully set forth in said bill; den*ies* that thereafter on the same day, or any day, said Suburban Electric Co., sold, or assigned or transferred said exclusive privilege above described to the North American Co., a corporation organized and existing under the laws of New Jersey; den*ies* that thereafter on the same day the said North American Co., sold or assigned or transferred to your orator, The Union Light Heat & Power Co., the said exclusive privilege hereinbefore described; den*ies* that your orator is now the owner of the said exclusive privilege or in possession or control of same; den*ies* that by virtue of being the owner of said exclusive privilege or being in full control or possession of the same, it is entitled in its behalf to the relief prayed for, by said complainant in said bill.

Wherefore, these defendants having *been* fully answered confessed, traversed and avoided or denied all the matters in the said original bill of complaint, filed by said Chas. H. Shaw, trustee of the Suburban Electric Co., and in the supplemental bill of the Union Light, Heat & Power Co., material to be answered according to their best knowledge and belief, humbly pray this honorable court to enter its judgement, that these defendants respectively be hence dis-

missed with their reasonable costs and charges in this behalf most wrongfully sustain- and they pray as in their original bill.

F. J. HANLON,
Solicitor for Defendants.

53 Afterwards, to-wit: on July 1st, A. D. 1901, came the complainant by his attorney, and filed replication herein, in words and figures following, to-wit:

United States Circuit Court, District of Kentucky.

CHARLES H. SHAW, Trustee,
vs.
THE CITY OF COVINGTON ET AL.

Replication of Charles H. Shaw, Trustee, and the Union Light, Heat & Power Company, a Corporation.

These replicants, Charles H. Shaw, trustee in bankruptcy of the Suburban Electric Company, a corporation, and The Union Light, Heat & Power Company, saveing and reserving to themselves all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer and amended answer *to* the defendants herein, for replication thereunto say that they do and will ever maintain and prove their said bill and supplemental bill to be true, certain and sufficient in the law to be answered by said defendants, and that the answer and amended answer of the said defendants are very uncertain, evasive and insufficient in law to be replied unto by those replicants; without that, that any matter or thing in the said answer and amended answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and truly sufficiently replied unto, confessed or avoided traversed or denied, is true; all which matters and things these replicants are ready to aver maintain and prove as this honorable court shall direct, and humbly *pary* as in and by said bill they have already prayed.

ERNST & CASSATT,
Solicitors for Complainants.

54 And on the day following, to-wit: on October 4, A. D. 1901, came the defendants by their attorney and filed motion for judgement dissolving restraining order and dismissing bill clothed in words and figures following:—

United States Circuit Court, District of Kentucky.

CHAS. H. SHAW, Trustee, etc., vs. CITY OF COVINGTON, &c. } Motion.

The respondents, and each of them respectively, move the court to submit for judgement dissolving injunction, and dismissing bill of complaint.

F. J. HANLON,
Solicitor for Defendants.

Afterwards, to-wit:—on October 8, A. D. 1901 an entry was made upon the journal of this court clothed in words and figures following, to-wit:—

Journal "I," page 177.

This day came the defendant by F. J. Hanlon, its attorney and moved to dissolve the restraining order heretofore issued herein and to submit the case upon the pleadings.

Came the complainants by Ernst & Cassatt his attorneys and filed affidavit and moved the court for an extension of time in which to take the proof herein, and objected to the motion to dissolve restraining order and submit. The court being now fully advised overrules defendants' motion to dissolve restraining order and submit generally, to which ruling defendants by *its* attorney *accepts*. It is further ordered that complainant have 30 days from the date of this entry in which to complete the taking of proofs, and defendant is given 30 days thereafter in which to complete the taking of its proof. To which ruling of the court defendant by counsel comes and accepts.

55

Said motion for extension of time referred to in the foregoing entry was and is in words and figures following, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

CHAS. H. SHAW, Trustee, etc., vs. THE CITY OF COVINGTON ET AL. } Motion for Extension of Time.

Now comes the complainant, The Union Light, Heat & Power Co., and asks the court that the time be extended within which testimony may be taken in said cause, for the reason that the taking of testimony has been prevented by the illness and absence of counsel.

ERNST, CASSATT & McDOUGALL,
Counsel for Complainant.

Afterwards, to-wit, on October 18, A. D. 1901, a motion to require complainant to execute injunction bond was filed herein in words and figures following, to-wit:—

56 United States Circuit Court, District of Kentucky.

CHAS. H. SHAW, ETC.,
vs.
THE CITY OF COVINGTON, ETC.

Now come the respondents herein, respectively, and say that since the filing of the original bill herein, and the granting of the injunction herein, that on the 26th day of April A. D. 1901, the complainant Chas. H. Shaw, trustee in bankruptcy — the Suburban Electric Co., has been discharged, and all the rights and franchise of said Co., have been restored to it.

That thereafter on the same day said Suburban Electric Co., sold, assigned and transferred all its right, privilege and franchises to the North American Co., a corporation organized and existing under the laws of New Jersey; that thereafter on the same day the said North American Co., sold, assigned and transferred to the Union Light, Heat & Power Co., all its rights privileges and franchises purchased from the Suburban Electric Co., aforesaid, and that the said Union Light, Heat & Power Co., is now the real party complainant herein, as the record herein will show.

Wherefore respondents move this honorable court to require the Union Light, Heat & Power Co., to execute a bond herein to indemnify the respondent herein, The City of Covington against any loss it may sustain by reason of the wrongful*l* suing out of said injunction herein, and in the event said injunction is not sustained.

F. J. HANLON,
Solicitor for Respondents.

57 Afterwards, to-wit:—on October 21, A. D. 1901, and entry was made upon the journal of this court, clothed in words and figures following, to-wit:—

Journal "I," page 191.

This day came the defendant The City of Covington, by F. J. Hanlon, and move- the court that the Union Light, Heat & Power Co., be required to execute a new bond upon the restraining order heretofore issued herein. The court not being fully advised, takes time and said motion is submitted.

Afterwards, to-wit:—on November 4, A. D. 1901 a motion for extension of time to take proof was filed herein, in words and figures following, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

CHAS. H. SHAW, ETC.,
vs.
CITY OF COVINGTON, ETC. } Motion.

Now comes the complainant, The Union Light, Heat & Power Co., and prays the court for an extension of time of 30 days from the 7

of November in which to take testimony on behalf of the complainant, on the ground that owing to the absence of necessary witnesses from the jurisdiction, and the moving at the present time of the city records of Covington, it is impossible for said complainant to get his testimony within the time heretofore granted.

ERNST, CASSATT & McDOUGALL,
Attorneys for the Union Light, Heat & Power Co.

58 Afterwards, to-wit: on December 16" A. D. 1901 a motion for leave to file amendment to bill of complaint was filed herein, in words and figures following, to wit:—

United States Circuit Court, Eastern District of Kentucky.

CHAS. H. SHAW, &C.,
v.
THE CITY OF COVINGTON, ETC.

Now come the complainants and move the court for leave to file an amendment to a bill herein lodged with the clerk this day, for the reason that said amendment contains matter material to the cause of action of the complainant, as set forth in the original bill herein, and that the same could not have been sooner introduced into the bill by the use of reasonable diligence.

FORAKER, OUTCALT, GRANGER AND PRIOR,
ERNST, CASSATT & McDOUGALL,
Attorneys for Complainants.

Afterwards, to-wit: on December 17" A. D. 1901 a motion to assign a day for hearing and to submit was filed herein, in words and figures following, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

CHARLES H. SHAW, ETC.,
v.
CITY OF COVINGTON, ETC.

Now come the defendants and move the court to assign a day of argument of this cause and to submit same for judgment.

F. J. HANLON,
Solicitor for Defendants.

58*a* And on the same day, to-wit, on December 17" A. D. 1901 motions to publish depositions were filed herein, same being in words and figures following, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

CHARLES SHAW, ETC., v. CITY OF COVINGTON, ETC. } Motion to Publish Depositions.

Now come the respondents and move the court that the depositions heretofore filed herein on behalf of respondents be published.

F. J. HANLON,
Solicitor for Respondents.

United States Circuit Court, Eastern District of Kentucky.

CHARLES H. SHAW, Trustee, ET AL., Complainants, v. THE CITY OF COVINGTON ET AL., Defendants. } Motion to Publish Depositions.

Now come complainants and move the court that the depositions heretofore filed herein on behalf of complainants be published.

FORAKER, OUTCALT, GRANGER & PRIOR,
ERNST, CASSATT & McDOUGALL,
Attorneys for Complainants.

And on the same day, to-wit, Dec. 17" 1901 an entry was made herein upon the journal of this court, in words and figures following, to-wit:—

Journal "I," page 263.

On motion of the defendant it is now ordered that all depositions in this case heretofore taken and lodged in the clerk's office, be and same are now published and filed.

59 Afterwards, to-wit:—on December 24" A. D. 1901 an affidavit on motion for leave to file amendment was filed herein in words and figures following, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

CHARLES H. SHAW, ETC., v. CITY OF COVINGTON ET AL.

STATE OF OHIO, *County of Hamilton,* } *ss:*

Richard P. Ernst, being duly sworn, says that he is one of the attorneys for the complainant herein; that the amendment to the bill of complaint this day offered is not made for the purpose of vexation or delay; that the matter of the proposed amendment is material and could not with reasonable diligence have been introduced into the bill.

Affiant says that said amendment will not change the cause of action or delay the trial, as it will not require the taking of further proof, but is in effect an amendment to conform the pleadings to the proof.

RICHARD P. ERNST.

Sworn to before me and subscribed in my presence this 16" day of December A. D. 1901.

FRANK W. COTTLE,
Notary Public in and for Hamilton County, Ohio.

60 And on the same day to-wit:—on December 24, 1901, an entry was made upon the journal of this court, clothed in words and figures following, to-wit:—

Journal "I," page 266.

This day came the plaintiff, by leave of court first had and obtained — now files its amended bill herein, to which ruling of the court allowing said amended bill to be filed def't by its attorney comes and excepts. Came the defendant — its demurrer to said amended bill. Came again the defandant and not waiving demurrer, filed its answer to said amended bill. The court not being fully advised of and concerning the matters and things in said demurrer contained, takes time, said demurrer is submitted, and Jan. 22, 1902, is set for argument of said case.

Said amendment to said bill of complaint referred to in the foregoing entry was and is in words and figures following to-wit:—

United States Circuit Court, Eastern District of Kentucky.

CHAS. H. SHAW, ETC., *vs.* CITY OF COVINGTON ET AL. } Amendment to Bill of Complaint.

To the honorable judges of the circuit court in and for the eastern district of Kentucky:

And now come the complainants and with leave of court first had and obtained, amend the bill of complaint herein as follows,
61 viz:—the fourth paragraph thereof is amended to read as follows:—

4. That said Covington Electric Light Co., of Covington, Ky., was created by an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to incorporate the Covington Electric Light Co.," approved April 22, 1882, that by said act said Covington Electric Light Co., was authorized and empowered to enter in and upon the streets and public places of the city of Covington, and therein lay its pipes and mains and thereon erect its poles and posts and wires through and along any street or highway in the city of

Covington or adjacent thereto as it may see fit, and to generate and supply to the city of Covington, and its inhabitants, and persons and corporations located in and near said city, light and motive power generated by electricity and to supply light power or heat generated by elecricity to the city of Covington and such individuals and corporations contracting with it for such price and compensation as may be agreed upon between said company and said individuals and the said articles of incorporation further granted to the said Covington Electric Light Co., the exclusive privilege of conducting the business as above described, therein and adjacent to said city for the term of twenty-five years, that said corporation was duly organized under the provision of said act.

That the said electric light Co., in pursuance of the exclusive privilege granted to it by its said articles of incorporation did on or before the — day of January, 1891, enter upon the streets of the city of Covington and erect thereon its poles and wires and constructed in said city at great expense to it a large and expensive
62 electric light, plant for the purpose of generating electric light, power & heat in pursuance of the powers conferred upon it by its said articles of incorporation, and commenced and continued to supply the city of Covington and the citizens thereof with electric light and electric power generated through the plant so constructed by it, and carried and furnished to the consumers thereof over and by means of the poles and wires constructed by it, through the streets of Covington, as aforesaid. That said construction, operation and maintenance of said plants, poles and wires, as aforesaid, and the transaction of said business as aforesaid were well known to and acquiesced in and by the said City of Covington on and since said — day of ——, 1891, and that neither said city nor the officers thereof made any objection or protest at any time from said date until the filing of the answer to the bill herein, to said acts upon the part of said Co. That said city never required any bond under any ordina-ces or otherwise from said Co., or from the Suburban Electric Co., or insisted upon the same being furnished under any ordinances, or otherwise. That the said Covington Electric Light Co., was, at the time of its consolidation into the Suburban Electric Light Co., as hereinbefore set out, in full possession of the business being conducted by it as aforesaid and by said consolidation all rights, privileges, franchises and properties owned by said Covington Electric Light Co., including the exclusive privilege hereinbefore set out, passed to and became the property of the Suburban Electric Light Co. That thereafter the City of Covington recognized and acquiesced in the said exclusive franchises and privilege of Suburban Electric Co., as aforesaid and entered into various contracts with the said Suburban Electric Co., recognizing its exclusive franchise as aforesaid and contracting with said company to supply light to
63 said city and assigning to said company the option of the city to purchase the plant and franchise of the Covington Gas Light Co., and said City of Covington assessed and collected a franchise tax from said Suburban Electric Co., upon its franchise in

said city of Covington, as aforesaid, during the entire time since the organization of the said Suburban Electric Light Co.

ERNST & CASSATT & McDOUGALL,
FORAKER, OUTCALT, GRAINGER & PRIOR,
Solicitors for Complainants.

Said demurrer referred to in the foregoing entry was and is in words and figures following, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

CHAS. H. SHAW, Trustee, etc., }
vs.
CITY OF COVINGTON ET AL. }

Now comes the defendant- herein respectively by protestation, — now confessing or acknowledging all or any of the matters and things in the said plaintiffs' amended bill filed herein on the 24th, day of December, 1901, to be true in such manner and form as the same — therein set forth and alleged do demurr*er*, and for cause of demurrer show*eth* that said plaintiffs' have not in and by the said bill as amended, made or stated any such cause as do- *are* ought to entitle *it* to any such relief as hereby sought, and prayed for from or against these defendants or either of them.

Wherefore and for divers other good causes of demurrer appearing in said bill, these defendants respectively demur thereto and humbly demand the judgement of this court, whether they shall be compelled to make any further or other answer to said bill
64 as amended and to be hence dismissed and for their charges in this behalf most wrongfully sustained.

F. J. HANLON,
Solicitor for Respondents.

DISTRICT OF KENTUCKY, }
County of Kenton. }

W. A. Johnson makes solemn oath and says that he is one of the above named defendants and mayor of the city of Covington, and the foregoing demurrer is not interposed for delay and that the same is true in point of fact.

W. A. JOHNSON.

Subscribed and sworn to before me this 24 day of Dec., 1901.

F. J. HANLON,
N. P., K. C., Ky.

I hereby certify that in my opinion the above demurrer is well founded in point of law.

F. J. HANLON,
Counsel for Defendants.

Said answer referred to in the foregoing entry was and is in words and figures following, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

CHAS. H. SHAW, ETC., *vs.* CITY OF COVINGTON ET AL. } Answer to Amended Bill of Complaint.

Now comes the defendants herein respectively and not waiving demurrer herein filed by them to the amended bill of complaint filed by the plaintiffs on the 24th day of December, but wholly relying and insisting thereon for answer to so much of the said
65 bill as they are advised it is material or necessary for them to answer deny that by the said act said Covington Electric Light Co., was authorized or empowered to enter in or upon the streets or public places in the city of Covington or adjacent thereto as it may see fit, or to generate or supply to the city of Covington, or its inhabitants or persons or corporations located in or near said city, light or motive power generated by electricity or to supply light power or heat generated by electricity to the city of Covington or such individuals or corporations contracting with it for such price or compensation as may be agreed upon between said Co., or between said individuals or corporations, or the said articles or incorporation farther granted to the said Covington Electric Light Co., the exclusive privilege of conducting the business as above described therein or adjacent to said city for the term of 25 years or any other term of years: deny that said corporation was duly organized under the provisions of said act.

Defendants respectively deny that said Covington Electric Light Co., in pursuance of the exclusive privilege granted to it by said articles of incorporation did on or before — day of —— 1891, or at any other time enter upon the streets of the city of Covington or erect thereon its poles or wires, or construct in said city at great expense to it, the large or extensive electric light plant for the purpose of generating electric light, power or heat, in pursuance of the powers conferred upon it by its said articles of incorporation, or commenced or continued to supply the city of Covington or the citizens thereof with electric light, or electric power generated through the plant so constructed by it, or carried or furnished to the consumers thereof over or by means of the poles or wires, constructed by it
66 through the streets of Covington as aforesaid.

Deny that said construction, operation or maintenance of said plants, poles or wires as aforesaid in the transaction of the said business as aforesaid, were well known to or acquiesced in by the said City of Covington, on or since — day of —— 1901, or at any other time; deny neither said city nor the officers thereof made any objections or protest at any time from said date until the filing of the answer to said bill herein to said act upon the part of said Co., deny that said city never required any bond under any ordinance or otherwise from said Co., or from the Suburban Electric Co., or insisted upon the same being furnished under any ordinance or otherwise. They deny respectively that the said Covington Electric Light Co., was at the time of its consolidation into the Suburban

Electric Light Co., as hereinbefore set out, in full possession of the business being conducted by it as aforesaid, or by said consolidation all rights, privileges or franchises or properties owned by the said electric light Co., including the exclusive privilege herein before set out, passed to or became the property of the Suburban Electric Co.,; deny that thereafter the City of Covington recognized or acquiesced in the said exclusive franchise or privilege of the Suburban Electric Light Co., as aforesaid, or entered into various contracts with the said Suburban Electric Light Co., recognizing its exclusive franchise as aforesaid or contracting with said Co., to supply light to said city, or assigning to Co., the option of the city to purchase the plant and franchise of Covington Gas Light Co.

67 Wherefore these defendants having fully answered traversed and avoided or denied all the matters in the said bill of complaint as amended material to be answered according to their best knowledge and belief humbly pray this honorable court to enter its decree that these defendants respectively be hence dismissed with their reasonable costs, and charges in this behalf most wrongfully sustained.

F. J. HANLON,
Solicitor for Defendants.

Afterwards, to-wit:—on Feb. 4, A. D. 1902 an entry was made upon the journal of this court clothed in words and figures following, to-wit:—

Journal "I," page 317.

This cause coming on for final hearing, was argued by counsel. Whereupon, the usual hour for adjournment having arrived and the argument not being completed, the further hearing is continued until Tuesday, February 11, 1902, at 11.30 a. m.

And on the same day, to-wit:—on February 4, A. D. 1902, an injunction bond was filed herein in words and figures, following, to-wit:—

UNITED STATES OF AMERICA,
Eastern District of Kentucky, } ss:

Injunction Bond.

Know all men by these presents:—that the Union Light, Heat & Power Co., principal, and National Surety Co., surety,— held and firmly bound unto the City of Covington and Wm. A. Johnson, mayor of the said city of Covington, in the sum of ten thousand dollars ($10,000.00) to the payment of which they bind themselves, their heirs, executors and administrators firmly by these presents.

68

Sealed with their seals, and dated this — day of February A. D. 1902.

The condition of the above obligation is such, that whereas,

Charles H. Shaw, trustee in bankruptcy (in which case the Union Light, Heat & Power Co., thereafter interpleaded as plaintiff) citizen of the State of Kentucky having filed on the chancery side of the circuit court of the United States for the eastern district of Kentucky a bill against the said city of Covington and W. A. Johnson, mayor of said city of Covington and having obtained an allowance of an injunction, as prayed for in said bill, from the judge of said court, Honorable Walter Evans.

Now, if the said The Union Light, Heat & Power Co., shall abide the decision of said court pay all money and costs which shall be adjudged against it in case the said injunction shall be dissolved, then these presents shall be void; otherwise to remain in full force.

THE UNION LIGHT, HEAT AND POWER COMPANY, INCORPORATED.
JAMES P. ERNST. [SEAL.]
NATIONAL SURETY CO.,
By JOHN T. ROUSE, [SEAL.]
Res. Vice-President.

Attest: A. H. SINGER, *Res. Ass't Secretary.*

Sign- and sealed in presence of—
JOS. C. FINNELL.

Afterwards, to-wit:—on June 7, A. D. 1902. a motion for rehearing was filed herein in words and figures following, to-wit:—

69 United States Circuit Court, Eastern District of Kentucky.

CHAS. H. SHAW ET AL. *vs.* THE CITY OF COVINGTON ET AL. } Motion for Rehearing and Further Argument.

Comes now the plaintiff in the above *and* entitled case and moves the court to grant a re-hearing and further argument upon the questions envolved upon the ground that the points indicated in its oral decision of said case were not suggested or an opportunity given for a full argument upon the same in the hearing heretofore had.

FORAKER, OUTCALT, GRANGER AND PRIOR,
ERNST, CASSATT AND McDOUGALL.

Afterwards, to-wit:—on June 10th, A. D. 1902 an entry was made upon the journal of this court clothed in words and figures following, to-wit:—

Journal "I," page 478.

This cause coming on for hearing upon motion for re-hearing filed herein by complainants on June 7th. Argument was heard and the court, now being fully advised overrules said motion.

Afterwards, to-wit:—on June 17th, A. D. 1902, an entry was made upon the journal of this court clothed in words and figures following, to-wit:—

Journal "I," page 482.

70 This day the court filed its written opinion herein. No judgement upon said opinion is now entered pending motion of complainant for a further hearing.

Said opinion referred to in the foregoing entry was and is in words and figures following, to wit:

71 United States Circuit Court, Eastern District of Kentucky, at Covington.

CHARLES H. SHAW, Trustee, ET AL.
vs.
THE CITY OF COVINGTON ET AL.

This suit was originally brought by the complainant, Charles H. Shaw, trustee, in bankruptcy of the Suburban Electric Company, a Kentucky corporation, hereafter referred to as the Suburban Company, against the City of Covington, a Kentucky municipal corporation, and William A. Johnson, its mayor. Since then, the Union Light, Heat & Power Company also a Kentucky corporation, hereafter referred to as the Union Company, has, upon its bill in the nature of a supplemental bill, been made a party complainant also, and this suit, as it now stands, is being prosecuted for its benefit to protect a right asserted in its favor. That right is an exclusive franchise to furnish electric light to said city and its inhabitants until April 22, 1907. The injury to it which is complained of is a threatened one, to-wit, the issuance of bonds to provide a fund with which to erect a plant to furnish electric light to the city alone and the erection of such a plant, under an ordinance passed in pursuance to a vote of the electors of the city in favor thereof, and the furnishing of electric light by it to the city alone. The relief which is sought is an injunction against this threatened wrong.

The defendants deny that the Union Company has such a right or is entitled to exercise it and this is the main, if not only, matter in dispute in this case. The links in the chain of title upon which the Union Company's right is based are six in number, and are as follows:—to-wit. an act of the legislature of Kentucky, ap-

72 proved April 22, 1882, incorporating the Covington Electric Light Company, hereafter referred to as the Covington Company, and granting to it an exclusive franchise to furnish said city and its inhabitants electric light for the terms of twenty-five years from that date and the privilege of using the streets and highways of that city for that purpose; an agreement of consolidation entered into April 11, 1894, by said Covington Company and two other Kentucky corporations furnishing electric light in the cities of Newport and Dayton, Kentucky, whereby a new and single corporation,

to wit, said Suburban Company was created; an adjudication in bankruptcy made by the United States district court for the district of Kentucky on — day of —— 1899, against said Suburban Company and subsequent appointment in said proceedings of the complainant, Shaw, as trustee of said company; the termination of said bankruptcy proceedings, and re-investment of said Suburban Company with all its property, rights and franchises on the — day of ——; a deed of transfer made April 30, 1901, from said Suburban Company to the North American Company, a New Jersey corporation, of all its property rights and franchises; and lastly, a deed of same date from said North American Company to the complainant Union Company of all the property rights and franchises acquired by it from the Suburban Company.

The defendants attack this chain of title at several points. They do not deny that an exclusive franchise of the nature and extent above stated was attempted to be granted to the Covington Company by its act of incorporation. Section 5 of said act, apart from a forfeiture clause hereinafter quoted, is in these words;

"That the business of said company is limited to furnish-
73 ing and supplying the city of Covington and its inhabitants and persons and corporations located near said city with light and motive power generated by electricity, steam or other artificial means or of furnishing or supplying either said light, power or heat and may charge therefor such price and compensation as may be agreed upon between the said company and the individual or corporation contracting with it, and in aid of its object, it may acquire and hold such real estate as may be necessary for the location of its works and carrying into effect the purposes of its organization, and the body hereby incorporated shall have the exclusive privilege of conducting the business above described within and adjacent to said city for the term of twenty-five years."

The claim, however, that said grant was invalid because in violation of that section of the bill of rights of the constitution of Kentucky, which declares:

"That all freemen, when they form a social compact, are equal and that no man or set of men, are entitled to exclusive separate public emoluments or privileges from the community but in consideration of public services."

It was held by the Supreme Court of the United States in the case of

New Orleans Gaslight Co. *v.* Louisiane Light, etc., Mfg. Co., 115 U. S., 650,

that, irrespective of such a constitutional provision, such a grant was valid.

In the case of

Citizens' Gaslight Co., *v.* Louisville Gas Co., 81 Ky., 263, the then four judges of the court of appeals of Kentucky were equally divided upon the question as to whether the grant of an exclusive franchise of the nature of that involved herein was in conflict with

the foregoing provisions of the State constitution. But the
74 Supreme Court of the United States, upon writ of error from
the judgement of the State court in that case, held it was not in conflict therewith.

Louisville Gas Co. *v.* Citizens Gaslight Co., 115 U. S., 683, Mr. Justice Harlan, in delivering the opinion of the court said:

"While the judgement below, in view of the equal division in opinion of the judges of the State court, does not rest upon any final determination of this question by that tribunal, it cannot be ignored by us; for, at the threshold of all cases of this kind, this court must ascertain whether there is any such agreement on the part of the State as constitutes a contract, within the meaning of the Constitution of the United States. If the services which the gas company undertook to perform, in consideration of the exclusive privileges granted to it, were public services, within the meaning of the bill of rights of Kentucky, then the grant of such privileges was not forbidden by the State constitution. In N. O. Gas Light Co. *v.* Louisiana Heat & Light Producing and Manufacturing Co., (*post* 516), just decided, it was held that the supplying of gas to a city and its inhabitants, by means of pipes and mains laid under its public ways, was a franchise belonging to the State, and that the services performed, as the consideration for the grant of such a franchise, are of a public nature. Such a business is not like that of an ordinary corporation engaged in the manufacture of articles that may be quite as indispensible to some persons as are gas lights. The former articles may be supplied by individual efforts, and with their supply the Government has no such concern that it can grant an exclusive right to engage in their manufacture and sale. But as the distribution of gas in thickly populated districts is, for the reasons stated in the other case, a matter of which the public may assume control, serv-
ices rendered in supplying it for public and private use con-
75 stitute, in our opinion, such public services as, under the
constitution of Kentucky, authorized the legislature to grant to the defendant the exclusive privileges in question. This conclusion is justified, we think, by the decisions of the court of appeals of that State."

This decision of the supreme court in this case has been accepted as correct and followed by the court of appeals of Kentucky in the subsequent case of—

City of Newport *v.* Newport Light Co., 84 Ky., 166.

It must be held, therefore, that the grant of said exclusive franchise to the Covington Company was valid.

The next point of attack is the second link in the chain of title relied on, to-wit: the consolidation agreement between the Covington Company and the other two Kentucky corporations made April 11th, 1894. Indeed, this would seem to be the main point of attack. It is claimed that, notwithstanding the Covington Company had acquired such a franchise by its charter, it did not continue to own it when the agreement of consolidation was made, having theretofore lost it, and hence it could not pass by virtue thereof from that com-

pany to the Suburban Company, the new and single corporation created thereby, and that, even if it did continue to own it until then, that agreement did not have the effect of passing the franchise from the one to the other corporation.

First as to the claim that the Covington Company, when it entered into the agreement of consolidation had lost its franchise and did not then own it, so that it might pass from that company to the Suburban Company by virtue thereof. This condition, it is claimed, was brought about in either one of several ways. The main one relied on is the operation of the forfeiture clause hereinbefore referred to. That clause follows the granting clause heretofore quoted immediately and with it constitutes the whole of section 5 of the Covington Company's charter. It is in these words;—

76 "But a non-user of the privilege of this act of incorporation for five years shall work a forfeiture."

The facts in regard to user by said company of the privileges granted to it by said act of incorporation are not in dispute. Shortly after the passage of that act, to-wit:—on May 1st, 1882, fifty one hundred dollars of the authorized one hundred and fifty thousand dollars of the capital stock of said company, the subscription and payment for five thousand dollars of which was essential to its organization, was subscribed for. But no organization was then had, because payment had not been made for the stock and none was had until June 2nd, 1884, after the passage of an amendment to the charter on May 5, 1884, permitting an organization without payment for said stock. Thereafter the organization of the company was kept up regularly by the election of officers at the stated annual periods. But no use was made by the company of its franchise to do until in the early part of the year 1891. At that time the original stockholders sold out to others who paid for said stock and subscribed and paid for a sufficient number of additional shares of capital stock to make the whole stock amount to one hundred thousand dollars. Thereupon, the company purchased the plant, poles and wires of another company, which seems to have had no franchise at all, and entered upon the operation thereof. Thereafter it greatly enlarged said plant and extended said poles and wires and raised by mortgages the sum of $250,000 to enable it to do this; and at the time of consolidation it was doing a business amounting to $— per year. It is thus seen that no use was made by said Covington Company of its franchise to do until the early part of the year 1891, more than five years after the date of the act of incorporation or the organization thereunder. At that time use thereof began to be made by it and was continued by it without interruption until the

77 consolidation; and since then, it has been used continuously by its successors in title. In the exercise of it public lighting has been furnished to the defendant city and paid for by it. It is suggested by counsel for complainants that because the Covington Company was organized within five years from the passage of its charter and that organization was kept up regularly thereafter until it began to exercise its franchise to do there was no such non-*suer* for five years as was contemplated by this forfeiture clause. We

hardly think that this position is correct and are inclined to hold that, notwithstanding what took place in the matter of organization and keeping it up, there was such non-user as was then contemplated. But, in view of the position we take, in reference to this forfeiture clause in another particular, it is not necessary to decide this matter. Before alluding to this position, a word or two as to the extent of the forfeiture provided for by the clause. It provides that the non-user for five years of the "privilege" of the "act of incorporation" "shall work a forfeiture." It does not say in express terms what shall thereby be forfeited. But there seems no reason for doubt that it was intended that the act of incorporation and every right acquired under it should be forfeited and not simply the exclusive feature of the franchise granted by section 5 of that act.

Was it intended, then, that the non-user contemplated by the forfeiture clause should, *ex proprio vigore*, work a forfeiture to that extent? In other words, was it intended that such non-user should automatically, as it has been aptly put by counsel for complainants, or *ipso facto*, work such a forfeiture? Numerous authorities construing similar clauses are to the effect that such is not the meaning of such clauses. It has been so held as to clauses of a somewhat more stringent character. As, for instance, it has been so held as
78 to clauses providing that upon non-user the grants made "shall cease determine and be void" "shall cease and determine," "shall thereupon cease to exist," "shall cease," or "shall be null and void." It has been so held as to clauses providing that upon non-user that grants made "shall be dissolved," or "shall be forfeited." And in the case of—

People *v.* Los Angeles R'y Co., 91 Cal., 338,

it was held that a clause in a charter in these words, "a failure to comply with these provisions works a forfeiture," was not self executing.

On the other hand, the authorities hold that the sole effect of a forfeiture clause like the one in question is to confer a right upon the State from which the grant has emanated to put an end to its existence by direct proceedings against the corporation. Until, therefore, its existence has been thus terminated, the grant remains in full force as if nothing had happened. Hence it is that in such cases the question of forfeiture cannot be raised by any other than the State and not at all in collateral proceedings. The law to this effect is nowhere better stated than in

Clark *v.* Marshall on Private Corporations, vol. 2, sec. 313*a*.

It is there said:—

"When it is said that a corporation may forfeit its charter by mis-user or non-user of its franchise, it is not meant that the mis-user or non-user results *ipso facto* in its dissolution. On the contrary, as a general rule, however long a corporation may fail to exercise the power conferred upon it, or however much it may abuse them, a forfeiture of its charter can only take effect upon a udgement of a competent tribunal in judicial proceedings instituted

by authority of the State. The State may waive the forfeiture, and until it institutes proceedings to have a forfeiture judicially determoned and declared, and a judgement or decree of forfeiture
79 is rendered, the existence of the corporation continues for all purposes just as if there had been no mis-user or non-user; and the forfeiture cannot be set up collaterally by private individuals or other corporations, or even by the State for the purpose of attacking the right of the corporation to exercise the powers and franchises conferred upon it by its franchise."

Such has been recognized to be the law by the court of appeals of Kentucky in the cases of—

Bank *v.* Trimble, 6 B. M. 601.
Harrison *v.* R'way Co., 9 B. M. 470.

In the former case Judge Breck said:

"Whether there had or had not been a forfeiture of the charter by non-user or mis-user or for a failure to comply with the requisitions thereof in any respect, was a matter which could not collaterally have been gone into and rendered available in this controversy. The question of forfeiture could only be determined by a direct judicial proceeding."

Counsel for defendants treat the forfeiture clause in question as if it were a condition precedent to the taking effect of the grant or to the right to exercise the franchise conferred by it. Of course, if such were its nature, then either the Covington Company never acquired the franchise granted by its charter or after the lapse of five years from its date had no longer any right to exercise it. But the authorities are uniform to the effect that such a clause creates a condition subsequent and not a condition precedent.

Another way in which it is claimed by defendants that the Covington Company had lost before the making of the agreement of consolidation the franchise granted to it by its charter is by its failure to execute the bond provided for in section 8 of an ordinance passed by the city council of Covington on the 21st day of June, 1883, and entitled:—
80 "An ordinance prescribing the terms upon which streets, alleys, avenues and public grounds of the city of Covington, Kentucky, may be used by incorporated companies, firms or individuals engaged in the business of furnishing light by means of electricity."

Section I of this ordinance is in these words:

"That any incorporated company, firm or individual engaged in the business of furnishing light by means of electricity may, with the consent of owners or lessees of the abutting property, erect and maintain the necessary number of poles, wires, supports, brackets, masts and such other fixtures as are necessary to the business of furnishing the city and its inhabitants with light by electrical currects, and may erect and maintain all such poles, wires, brackets, supports, masts and other fixtures as may be necessary within said city subject, however, to the rules and regulations herein prescribed and to such other regulations and rules as the city council of Cov-

ington may hereafter ordain and prescribe for the protection of the interest of said city and its inhabitants. The aforesaid permission, shall not be for a longer period than twenty-five years from the date of the grant of same in any case."

Section 8 thereof is in these words:

"Whenever any incorporated company, firm or individual shall wish to operate under the provisions of this ordinance, it or they shall make a written application to the city council, stating their desire to operate under this ordinance and the time for which they desire to operate, not exceeding twenty-five years; and shall accompany said written application by a bond in the penal sum of twenty thousand dollars with good and sufficient security conditioned
81 to keep and perform all the terms and conditions of this ordinance and to comply with all the rules and regulations herein provided and to save the city harmless from all loss, costs, damages, fees and expenses of every kind the said city may sustain or be put to in any manner, by reason of the grant of the privileges herein provided for or by reason of the failure of said incorporated company to comply with the terms, provisions, conditions, stipulations and regulations of this ordinance, or any one or more of them, and if the said council are then satisfied that permission shall be granted to said incorporated company, firm or individual, and if the bond presented shall be satisfactory to said council, the said council shall approve said bond and shall by ordinance or resolution, grant permission to said applicant to operate under the provisions of this ordinance."

The other sections of the ordinance, save section II, contain detailed provisions as to the manner of operation under said ordinance. Section II repeals a former ordinance passed by the city council October 5, 1882, in relation to said Covington Company, the purpose of which is indicated by its title, "An ordinance to enable the Covington Electric Light Company to exercise the franchises granted by the act of the General Assembly of Kentucky."

Section 2 of the amendatory ordinance of July 3rd, 1884, is in these words;

"The bond to be given by any such company, firm or individual shall be in the sum of ($20,000), as provided in said original ordinance, to which this is an amendment, and in addition to these conditions, stipulations and provisions to be contained in said bond, as provided in said original ordinance, the said bond shall
82 contain the further conditions that the said company, firm or individual accept the provisions of said ordinance, as now amended, shall restore to their former conditions and put in repair at his or their expense any streets, alleys, avenues, highways, public grounds or squares, that may be taken up, excavated or obstructed in any way by the laying of said pipes, mains or other conduits under said streets, alleys, avenues, etc., and that it will pay to the city all damages, costs, or expenses said city may incur, sustain or be compelled to pay by reason of taking up, excavating or obstructing of any of said streets, alleys, avenues, highways, etc., in the laying of said pipes, mains or conduits."

It will be more accurate to state defendant's position in this connection to be not that the Covington Company lost the franchise acquired by it under its charter by failing to give the bond provided for in this ordinance, as thus amended but rather that it never had the right to exercise that franchise because of such failure, or, to be still more accurate, that it never had such right, because it failed to obtain from the city council of Covington the permission provided for in said ordinance, the execution of the bond being a step necessary to the obtention of such permission. In other words, their position amounts to this; that it was necessary for the Covington Company to obtain the consent of the city council of Covington and that in pursuance of the ordinance of June 21, 1883, as thus amended, before it had the right to use the franchise granted to it by its charter. Is this position correct? We think not, and that because the Covington Company's charter attached no such condition to the right to exercise the franchise granted by it. It is true that section
83 6, thereof, which conferred upon said company the privileges of laying pipes and mains and of erecting poles, posts and wires through and along the streets and highways of the city in express terms, without leaving such privilege to be implied from the grant of the exclusive privilege of conducting the business of furnishing and supplying the city of Covington and its inhabitants with light and motive power generated by electricity, steam or other artificial means, contained in section 5, heretofore quoted, if indeed it could be so implied, provides that the use of such privilege shall be "subject to the regulations of the city authorities."

Said section is in words as follows:

"Said company shall have the privilege, subject to the regulations of the city authorities, to lay its pipes and mains and erecting its poles, posts and wires through and along any street or highway in the city aforesaid or adjacent thereto, as it may deem fit: Provided it in no way permanently obstructs the use of the same to the public or individual, and it is hereby required to place and put *in* repair any roadway, street, or highway through which its lines of pipes, wires, etc., may pass, but it is allowed to temporarily obstruct for a reasonable time any street in laying its lines and repairing the same."

It was not meant however, by the requirement that the use of such privilege so expressly conferred should be subject to the regulation of the city authorities that it could not be used at all without the consent or permission of such authorities. It meant no more than that the manner of its use should be subject to such regulation. The failure to regulate its use, therefore, could not effect the right to its use. It simply left the privilege to be used free from such regulation. The privileges which the Covington Company acquired under and by virtue of its charter it acquired directly therefrom and save in the matter of regulation as to the manner of their use the right to use them was absolute
84 and unconditional. In no other respect was the use of said privileges subject to the regulation of the city authorities, and to no extent whatever, was the right to use them at all dependent or

conditional upon their permission or consent. This being so, if the ordinance of June 21, 1883, as amended by the ordinance of July 3rd, 1884, required the Covington Company to make an application to the city council of Covington for the permission provided for therein accompanied by a bond of the character therein prescribed and to obtain such permission before it should have the right to use the privileges conferred upon it by its charter, it was so far, at least, unauthorized and invalid. It required that which the city council of Covington had no authority to require. It made that conditional which the legislature had made absolute, save in the manner of its use. It is contended by complainants that said ordinance as thus amended did not so require; that it had and was intended to have no relation whatever, to the Covington Company; that its object was to provide for other incorporated companies and for firms and individuals engaged in the business, as organized for the purpose of furnishing light by means of electricity, obtaining from the city council permission to use the streets, alleys, avenues and public grounds of the city of Covington and prescribing the terms upon which they might use them; and that it had relation only to such incorporated companies, firms or individuals as wished to operate under the provisions of said ordinance, leaving such as had the right to operate otherwise to do so under and in accordance with the requirements of that by which such right was conferred. It is plausible, however, to say the least, particularly in view of section II, repealing the prior ordinance of October 5, 1882, in relation to the Covington Company, that it was the intention of the city council of Covington by the ordinance of June 21, 1883, as amended, to require all
85 incorporated companies, firms and individuals engaged in the business or organized for the purpose of furnishing light by means of electricity, including the Covington Company, to obtain permission from it to use the streets, alleys, avenues and public grounds of the city in the manner and upon the terms therein prescribed, and having done so, that they should operate in accordance with the requirements thereof. But, conceding for the sake of the argument, that the ordinance is liable to this broad interpretation, as before shown, in so far as it related to the Covington Company and required it to obtain permission from the city council in the way and upon the terms prescribed by it before it should have the right to use said streets, alleys, avenues and public grounds, and carry on its business, it was unauthorized and invalid, and, in so far as it related to other incorporated companies, and to firms and individuals and undertook to confer upon them the right to use the streets, alleys, avenues and public grounds of the city of Covington for such purpose and to engage in the business of furnishing light by means of electricity in said city, upon obtaining permission of the city council thereof in the way and upon the terms prescribed by the ordinance, it would seem, conceding that authority to pass such ordinance existed without reference to the charter of the Covington Company, that, in view of the exclusive franchise granted to it thereby, the city council had no authority to pass it and to thus

confer such right upon other incorporated companies, firms and individuals.

Thus far, in considering the effect of the ordinance of June 21, 1883, as amended, upon the right of the Covington Company to use the privileges granted to it by its charter, it has been upon the basis that the right to use them was not thereby made dependent
86 or conditional upon its obtaining the permission or consent of the city council of Covington. If the contrary of this is assumed, to-wit:—that the right to use those privileges was thereby made dependent and conditional upon the obtention of such permission or consent, it is urged by complainants that no different result would follow. Their line of reasoning is this: By the ordinance of October 5, 1882, such permission and consent was given. As is well settled, where the right to exercise a franchise within a municipality is made dependent or conditional upon municipal permission or consent, such permission or consent once given can never be withdrawn so as to affect the right to exercise the franchise is concerned. In the case of—

Africa *v.* Board of Mayor & Aldermen, 70, Fed., 729, Judge Clark of this circuit, said:—

"It is to be borne in mind that plaintiff's franchise to operate his railroad is not derived from the minicipal corporation, but from the legislature itself, and it is none the less so because obtained under a general incorporation act, instead of a special statute, which is no longer constitutionally possible. * * *

The only authority delegated to the city in the completion of the franchise rights is the power to give its consent and to prescribe the terms and conditions on which the streets are to be used. * * * The statute does not reserve to the city council the right of repeal. So far as such right is reserved at all, it is reserved to the legislature itself. The statute does not vest the city with any power whatever to grant or to repeal a grant. Its power over the subject ends when it gives its consent and prescribes the conditions in an ordinance for that purpose. Whether the city council might withhold its consent altogether in the first instance is a point upon which the cases are not agreed and is not necessary to be considered here. When it has given its consent it has excepted and exhausted its power, so
87 far as the right to use the street is concerned."

Such being the case, the city council of Covington had no power to repeal the ordinance of October 5, 1882, and thus withdraw the permission and consent thereby given and to require the obtention or permission and consent under and in accordance, with the provisions of the ordinance of June 21, 1883.

To this is may be answered that the ordinance of October 5, 1882, and that of June 21, 1883, repealing it were passed before the Covington Company was organized under its charter, and it must be conceded that this position is not without some force. In view of it, we prefer to rest our decision that the right of the Covington Company to exercise the franchise conferred upon it by its charter, was not affected by the ordinance of June 21, 1883 as amended or by its failure to obtain permission in accordance with its terms, even if

that ordinance applied to it, upon the position, which we do not think can possibly be gainsaid, that the grant of such franchise to it was absolute and unconditional, save so far as the manner of its exercise was concerned, and that the right to exercise it was not made dependent or conditional upon the permission or consent of the city council of Covington.

Another and last way in which it is claimed by defendants that the Covington Company had before the consolidation lost the exclusive franchise granted to it by its charter is by repeal thereof by the legislature of Kentucky. Their claim here is not that it thereby lost that franchise entirely; only, that it so lost the exclusive feature thereof. In this respect this claim differs from the other two claims heretofore considered, to-wit:—that it had lost said franchise by failure to use it for five years after the date of its charter and that it had not acquired the right to use it by its failure to obtain the permission of the city council of Covington under and in accordance with the terms of the ordinance of June 21,
88 1883, as amended. In the one case the claim is that by reason of the failure to use the franchise to do for said length of time said company lost said franchise entirely and in the other case, by reason of the failure to obtain said permission it did not acquire the right to exercise said franchise at all. Two, statutory provisions passed subsequent to January, 1891, when the Covington Company first began to use its franchise and before the entering into the agreement or consolidation, are relied on as having accomplished such repeal and brought about such loss. One is section 36, article I, of the act of April 5, 1893, entitled, "An act providing for the creation and regulation of private corporations." Session Acts 1891–2–3, p. 626, (section 573 Kentucky Statutes.) The other is section — of the act of March 19, 1894, entitled, —

To which class the city of Covington belongs and which is the same as section 3058–6 Kentucky Statutes. The former provision is claimed to have had the effect to cut down the duration of the exclusive feature of said company's franchise from April 22, 1907, to September 28, 1897, and the latter of repealing it entirely.

Before taking up the question whether the exclusive feature of the Covington Company's franchise was affected by either one of these statutes to the extent claimed, it should be considered whether or not, it was within the power of the legislature to repeal same at the date of either act. The complainants contend that it was not. Their position is stated in these words, to-wit:—

"The exclusive franchise of the Covington Electric Light Company was a naked privilege until the company took possession under it. When the company entered into possession of the franchise and occupied the streets of the city of Covington in January, 1891,
89 that franchise became a vested property right, and was no more subject to amendment, alteration or destruction by the legislature than was the plant or other assets of the company."

Is this position sound? At the time the charter of the Covington Company was passed and possession taken under it there was in ex-

istence a statute law, known as the act of 1856, and now contained in section 1987 Kentucky Statutes, in these words;

"All charters and grants of or to corporations or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to repeal at the will of the General Assembly, unless a contrary intent be therein plainly expressed; Provided, that whilst privileges and franchises so granted may be repealed, no repeal shall impair their rights previously vested.

Did, or did not, the legislature of Kentucky, by virtue of this statute, have power after the Covington Company took possession under its charter in January, 1891, to repeal the exclusive feature of its franchise? The question is not involved in this case as to whether it had power to go further than this and deprive the Covington Company of its franchises entirely, so that it could no longer thereafter conduct the electric lighting business in the city of Covington, and no one interested in it as stock-holder, mortgagee or creditor could have it operated or disposed of for his benefit. It is questionable, to say the least, whether it did not have such power. It is true that in the case of—

People *v.* O'Brien, III N. Y. I.,

it was held by the supreme court of New York that the legislature of that State could not under a reserved power to repeal or amend put an end to the franchise of a street railroad company to operate its railroaf after same had been constructed, though it could terminate the existence and life of the company as a corporation, so that it could no longer operate same.

90 The case, however of—

Greenwood *v.* Union Freight R R. Co., 105 U. S. 13,

though attempted to be distinguished by the New York case, may be claimed to be contrary to this. In the case of—

City of Detroit *v.* Detroit City R'y Co., 56 Fed., 883,

Judge Taft said:

"It should be said that it is a mooted question whether, when a legislature exercises its right to repeal the charter of a corporation under the usual reservation clause, the repeal terminates those franchises of the corporation which are not corporate, and which are necessary to the enjoinment of property acquired by the corporation during its lawful existence. The court of appeals of New York, in the case of—

People *v.* O'Brien, III N. Y., I, 18 N. E. Rep., 692, has held that such a repeal does not take away the franchises to maintain and construct a street railway on a street in New York, the perpetual easement for which had been obtained from the city. It seems difficult to reconcile this case with Greenwood *v.* Freight Co."

In the case of—

Citizens St. R'y Co., *v.* City R'y Co., 64 Fed., 651–652,

Judge Woods calls attention to the same seeming conflict between these two cases.

But however this may be, it does not necessarily follow that, because the legislature could put an end absolutely to the franchise granted to the Covington Company, so that it should no longer have

any further existence for the benefit of any one, it could not repeal and terminate its exclusive feature. The Supreme Court of the United States, in the case of—

Hamilton G. & C. Co. *v.* City of Hamilton, 146 U. S., 258, has expressly held that such a feature of a franchise granted to a gas company was repealable at the will of the legislature under
91 a reserved power to repeal or amend. Mr. Justice Harlan in delivering the opinion of the court, said:

"If the statute under which the plaintiff became incorporated be construed as giving it the exclusive privilege so long as it met the requirements of law of supplying gaslight to the city of Hamilton and its inhabitants by means of pipes laid in the public way, there is no escape from the conclusion that such a grant, as respects, at least, its exclusive character was subject to the power of the legislature reserved by the constitution of altering or revoking it.

This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the constitution, may be a contract: but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke the exclusive character of such privilege cannot be regarded as one impairing the obligation of the contract, whatever may be the motive of the legislature or however harshly such legislation may operate in the particular case upon the corporation or the parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation."

Thus far we have considered the matter without reference to the special phraseology of the reservation statute of Kentucky, heretofore quoted. That statute in terms, if not in effect, is more
92 limited than the usual reservation statute in other States. It contains two express limitations.

One is the unless clause, to-wit:—

"Unless a contrary intent be therein plainly expressed." And the other the proviso, to wit:—

"Provided, that whilst privileges and franchises so granted may be repealed, no repeal shall impair other rights previously vested."

Both these clauses have been construed and applied by the court of appeals of Kentucky and the Supreme Court of the United States. As to the first of these two clauses, it was held by the Supreme Court of the United States in the case of—

Louisville Gas Co. *v.* Citizens' Gaslight Co., 115 U. S., 683,

that a provision in the charter of the Louisville Gas Company granting it an exclusive privilege of supplying the city of Louisville and its inhabitants with gaslight for a definite period, in these words, to wit:—

"No alteration or amendment to the charter of the gas company shall be made without the concurrence of the city council and the directors of the gas company,"

"plainly expressed" an intent that the charter of the company should not be subject to amendment or repeal at the mere will of the legislature, but only with the concurrence of the city council and the company's directors. This was contrary to the decision of the Kentucky court of appeals from whose judgement the case was carried to the Supreme Court upon writ of error.

On the other hand, it has been held that the granting of a franchise for a definite period of time was not a manifestation of an intent that it should not be subject to amendment or repeal.

In the case of:—

Citizens' Savings Bank *v.* Owensboro, 173 U. S., 648, Mr. Justice White said:

93 "The assertion that whereever it is stated in a legislative grant or charter that it is to last for a given period of time, therefore such provision is a plain manifestation of the intention of the legislature that the grant or charter shall not be repealed or amended for the time for which it was declared that it should last is fallacious, since it overlooks the consideration that the limit of time fixed for the duration of the charter or grant, like every other provision therein, it qualified by the reserved power to alter, amend or repeal. It hence results that where in a charter or grant enacted when there is a general statute reserving the power to repeal, alter, or amend, a time is stated, the granting act must be read just as if it declared that the charter or grant should exist for a designated time, unless sooner repealed, altered or amended. Indeed, reduced to its final analysis, the agreement that because in a grant or charter a time is designated for its duration it cannot, therefore, until the expiration of such time, be repealed, altered, or amended, is equivalent to saying that the reserved power cannot be exercised in any case of contract. For if every case of charter or grant where a time is fixed, either expressly or by necessary construction in the charter or grant, is taken out of the reach of the reserved power, it would follow that only those charters or grants which were determinable at will would come under the control of the power reserved. But to say this simply amounts to declaring that the reserved power applies and can be enforced only in those cases where it would be entirely unnecessary or useless to do so."

And in the case of—

City of Covington *v.* Kentucky, 173, U. S., 231,

it was held that the granting of a franchise to a corporation

"forever" did not indicate that it was not to be subject to

94 amendment or repeal.

As to the proviso, Paynter J., in the case of—

Deposit Bank of Owensboro *v.* Daviess Co., 102 Ky., 208,

has this to say:—

"The 'other rights' which have become vested while operating under the charter cannot be impaired by an amendment or repeal. These 'other rights' do not embrace 'privileges and franchises.' The 'privileges and franchises' are the rights bestowed by the State to be withdrawn or destroyed at the pleasure of the legislature.

Privileges and franchises are not vested rights, either in the letter, or spirit of the act of 1856. 'Other rights' referred to in that act are such as the beneficiaries under the charter may have in property, in fact, every interest which they could acquire in operating under the charter or law, and also such rights or interests as other persons may have previously acquired by contracts, mortgages, judgement, or otherwise in property belonging to the other corporations.

And in the case of—

Citizens' Savings Bank *v.* Owensboro, *supra*,

which is the same case as that in which Judge Paynter delivered the opinion just quoted from in the Supreme Court on error from the Kentucky court of appeals, Mr. Justice White, in speaking of the decision of that court, said :—

"In considering what constituted vested rights, the court clearly pointed out that rights of this character did not embrace mere privileges or franchises conferred by the granting act and such rights obviously come within the power to repeal and amend and were not within the category of those taken out of the reach of such power."

95 The construction thus put upon these limitations upon the reserved power to repeal contained in the Kentucky statute of 1856 and subject to which the Covington Company acquired its franchise is such that there is nothing in them to prevent the legislature of Kentucky from repealing, in purcuance of that power, the exclusive feature of that franchise. It has been held in a number of cases that an exemption from taxation contained in the charter of a Kentucky corporation was subject to repeal in pursuance of that power.

Louisville Water Co., *v.* Clark, 143 U. S., I.,
City of Covington *v.* Kentucky, 173, U. S., 231,
Citizens' Savings Bank *v.* Owensboro, 173, U. S., 174.
Deposit Bank of Owensboro *v.* Daviess Co., 102 Ky., 174.

An exclusive privilege of conducting the electric lighting business in a city and using the streets and alleys thereof for that purpose is simply an exemption from competition in that business and must stand on an equal footing with an exemption from taxation. In the case of—

Louisville Gas Co., *v.* Citizens' Gaslight Co., 115 U. S. 683, it was assumed that if it had not been for the clause in the charter of the Louisville Gas Company heretofore quoted, by which an intent was plainly expressed that the right of repeal was not reserved, the exclusive privilege conferred upon said company by its charter would have been subject to repeal.

The fact that investments have been made by persons interested in or having claims against a corporation having such an exemption or exclusive privilege, on the faith thereof, does not have the effect of curtailing the reserved power of repeal to any extent. Mr. Justice Field, in the case of—

Tomlinson *v.* Jessup, 15 Wall., 454, said :—

"It is true that the charter of the company when accepted by the corporation, constituted a contract between them and the State, and that amendment, when accepted, formed a part of the con-
96 tract from that date and was of the same obligatory character. And it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations cannot be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the State by the law of 1841 authorized any change in the contract as it originally existed or as subsequently modified or its entire revocation. The original corporation or subsequent stockholders took, their interests with knowledge of the extent of this power and the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation and of similar reservations in other charters is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise, if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contract with the corporators, which without that provision would be irrepealable and protected from any measure affecting its obligation."

The conclusion, therefore, must be that the legislature of Kentucky did have power to limit the duration of or repeal entirely the exclusive feature of the Covington Company's franchise at any time during its existence as a corporation. This being so, it is in order to consider whether the legislature cut down its duration to September 28, 1897, by section 36, article I, of the act of April 5, 1893 (section 573 Kentucky Statutes), or repealed it entirely by section — of the act of March 19, 1894, (section 3058-6 Kentucky Statutes). And first, as to the effect of the former provision. In order the better to determine this, a general survey of the act of April 5, 1893, should be taken. It consists of six articles
97 in all and covers the entire field of corporations. The last five articles contain provisions relating to the creation, organization, operation, powers and liabilities of five distinct kinds of corporations, to-wit:—Banks, trust companies, insurance companies, railroad companies and building and loan associations. The first one contains provisions relating to the creation, organization, operation, powers and liabilities of corporations for the transaction of any lawful business or to promote or conduct any legitimate object or purpose. The provisions thereof are made applicable to the five kinds of corporations before referred to, so far as they are not inconsistent with the provisions relating to them specially contained in the other articles. If it were not for the 36th section of the 1st article (section 573 Kentucky Statutes) said act would be entirely prospective, *i. e.*, it would have relation solely to corporations thereafter created and organized in pursuance to its provisions. Said section attempts to, and, so far as the legislature had power so to do, does bring the other provisions of said act in relation to corporations at

the time of its passage. So far as pertinent to the matter in hand, said section is in these words;

"The provisions of all charters and articles of incorporation, whether created by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict and all powers, privileges or immunities of any such corporations, which could not be obtained under the provisions of this chapter shall stand repealed on September 28th, 1897. * * * After the 28th day of September, 1897, the provisions of this chapter shall apply to all corporations created or organized under the laws of this State, if said provisions would be applicable to them if organized under this chapter."

98 It may be divided into two parts. The first part repeals certain provisions in the charters and articles of association of existing corporations. It may itself be divided in two parts; one repealing all provisions therein inconsistent with any of the provisions of said act concerning similar corporations; and the other repealing all provisions therein conferring "powers, privileges or immunities," "which could not be obtained under the provisions" of said act. The second part of the section, according to the original division thereof, adds certain provisions to the charters and articles of association of existing corporations, to-wit:—such provisions of said act as would be applicable to them if they had been created and organized in pursuance to said act. This subtraction from and addition to the provisions of the charters and articles of association of existing corporations it is provided shall take place at a common date in the future, to-wit:—September 28, 1897.

Since the passage of said act, this section has been construed and applied by the court of appeals of Kentucky in the case of—

Williams *v.* Nall — S. W. —

That case involved the second part of said section and it was therein adjudged that section 10, article I, of said act, imposing a double liability on the stock-holders in certain kinds of corporations was applicable to a corporation of that kind, in existence when the act was passed, on and after September 28th, 1897.

Hobson J., said:—

"Their only right to exemption from the debts of the corporation was by virtue of the statute giving it the power to exempt its stockholders from liability. This statute the legislature had the right to repeal not only by virtue of the provisions of the constitution above quoted, but by reason of the statutory reservation of

99 this legislative power by the act of 1856, passed long before the enactment of the statute under which the corporation was organized. The stockholders formed the corporation on conditions held out by the State. One of these conditions was that the act under which they were created might be amended or altered by the legislature at pleasure, as it might deem necessary. The legislature might, in the first place, have provided that the stockholders should be liable for the corporate debts; and where it provided that they should not be so liable but reserved the right to alter or amend the

law or to repeal any grant or franchise obtained under it, those who had acted under the statute with full notice of facts cannot complain that any constitutional right of theirs is violated by the alteration of the law."

Concerning the genesis of the act to which said section belonged, he said:

"One of the special a ms of the constitution was to rid the State of special legislation and to secure a more perfect uniformity in the laws of the State. To this end section 245 directed the appointment of commissioners to revise the statute laws of the Commonwealth. The commissioners so appointed, reported to the next General Assembly a bill which was passed by it, entitled "An act providing for the creation and regulation of private corporations, now chapter 32 Kentucky Statutes."

And concerning the purpose of that section, he said:

"The statute was intended to secure uniformity. Time was given until September 28th, 1897, for the old corporations to adjust their affairs before the law was applicable to them, but the whole purpose and spirit of the act would be defeated if they were exempted from the operation thereof."

Such, then, is the comprehensive character of the act of April 5, 1893, and the wide scope and purpose of the 36th section of its 1st article (sec. 573 Kentucky Statutes) in re-
100 lation to existing corporations. What, then, was the effect of that section upon the exclusive feature of the Covington Company's franchise? The first portion of the repealing part thereof had no effect thereon because it was not inconsistent with any of the provisions of said act concerning similar corporations. If the section had any effect thereon, it must have been by virtue of the second portion of said repealing part, which provided that all powers privileges or immunities of existing corporations which could not be obtained under the provisions of said act by similar corporations created and organized thereunder should stand repealed on September 28th, 1897. Did, then, that portion have the effect of cutting down said exclusive feature to September 28, 1897? This depends upon whether it was a power, privilege or immunity within the meaning of the statute and, if so, whether it could be obtained under the provisions of said act by a similar corporation created and organized thereunder. If it was such a power, privilege or immunity and could not be so obtained then by the terms of that provision, it stood repealed on said date. It is certain that it could not be so obtained. Such a corporation, *i. e.*, one whose business was similar to that of the Covington Company, to-wit:—furnishing electric light to the city of Covington and its inhabitants and persons and corporations located near said city could be created and organized under the provisions of the first article of said act. It authorized the creation and organization of corporations to transact any lawful business and to promote or conduct any legitimate object or purpose and such business was a lawful one. Such a corporation, so created and organized, would obtain the powers set forth in section 5 of said article, (section — Kentucky Statutes) which is in these words:—

101 "When the articles are filed and recorded, as provided, and the license imposed is paid to the State, the corporation shall be deemed to be organized for the purpose of transacting promoting or carrying on the business or purpose for which it was created; and shall thereupon become a body corporate and be known by its corporate name, and as such may adopt and use a corporate seal; and shall have power to sue and be sued, to contract and be contracted with; to pledge or mortgage its property, real or personal, to secure the fulfilment of its contracts; appoint, remove and elect officers, define their duties and require from any of them a bond for the faithful discharge of their duties; to prescribe by its board of directors by-laws for the government of the corporation not inconsistent with law; and to exercise, subject to law, such powers as may be necessary to conduct the business or promote and carry on the objects and purposes for which it was organized."

It is possible that it is correct to say that it would obtain other powers and privileges by other sections of said article. But it is certain that it could not obtain thereby or thereunder an exclusive privilege of transacting such business; nor can the powers conferred by the section quoted be held to embrace it. Such a privilege is made up of two elements. The privilege of transacting such business and exclusion of others from such privilege. The latter is an exemption or freedom from competition and is, therefore, an immunity, according to the strict meaning of that term. So, then, though the privilege of transacting the business of furnishing electric light to the city of Covington and its inhabitants and to persons and corporations located near the city could be obtained under the provisions of said act, *i. e.*, a corporation
102 with the right to transact business similar to that of the Covington Company, and, hence, a similar corporation, could be created and organized under the provisions of said act the right to transact such business exclusively could not be obtained thereunder. The exclusive feature, therefore, of the Covington Company's privilege was an immunity which could not be obtained under the provisions of said act. Or to put it otherwise, the privilege of furnishing electric light to the city of Covington and its inhabitants and to persons and corporations located near the city exclusively was a privilege that could not be so obtained. As to this, there would seem to be no room for doubt. But it remains to be considered whether such a privilege or such an immunity is a privilege or immunity within the meaning of those words, as used in the repealing portion of 36 section of article I, (section 573 Kentucky Statutes), under consideration. Was it intended thereby that all powers, privileges or immunities that could not be so obtained by similar corporations created and organized thereunder, or that only a certain kind of powers, privileges and immunities that could not be so obtained by such a corporation should stand repealed as of that date? And, if the latter, is the privilege or immunity in question of that kind? Complainant's counsel argue that a limited signification should be attached to the words "powers, privileges or immunities," contained in the statutory provision in question and

that they should not be held to be broad enough in meaning to include the right of an electric lighting company, like said Covington Company, or of a street railway, water, gas, telegraph or telephone company to use the streets and highways of a city or town to enable it to transact its business. The ground upon which they so argue is, that such a right cannot be obtained under the provisions of said act and if, therefore, it was embraced by said words, not only
103 the exclusive feature of said Covington Company's right in this particular, but the right itself and that of every other electric lighting company and of every street railway, water, gas, telegraph and telephone company stood repealed on September 28, 1897, in so far as the legislature of Kentucky had power to repeal them. Such a wholesale cutting down of such rights it is urged could not possibly have been intended by the legislature. In order, therefore, to prevent going beyond the intent of the legislature the signification of the words, "powers, privileges, or immunities," should be limited to what may be termed mere naked "powers, privileges or immunities," though its existence depends solely upon legislative authorization. That such is the nature of such a right is undoubtedly true. It is nothing more or less than an easement in the streets or highways. In the case of—

Louisville Trust Co., *v.* City of Cincinnati, 76 Fed., 299, Judge Lurton said:

"The grant of a right to enter upon and occupy a public street with the necessary tracks, wires and equipment of an electric street railway is a grant of a typical easement in property and, as such, is a contract right capable in the absence of express restrictions of being sold, conveyed, assigned or mortgaged and is, therefore, a right entitled to all the protection afforded other property or contract right."

In this characteristic of such a right, therefore, may be found a convenient boundary line betwe-n rights without and rights within said words, if their signification is to be restricted, so as not to include all rights which may be held by a corporation by virtue of legislative authority. It may be said, too, that such a right cannot be obtained under the provisions of said act by such a corporation created and organized thereunder. There is no provision
104 therein which can be said to confer such a right upon such a corporation created and organized thereunder. The last clause of the 5th section of the 1st article (section 5 — Kentucky Statutes), above quoted, which confers capacity "to exercise, subject to law, such powers as may be necessary to conduct the business or promote and carry on the subjects, objects and purposes for which it was organized," might be held to be broad enough to confer such a right, if it were not for the fact that the legislature of Kentucky has no power to confer such a right. It can simply confer power to acquire such a right for a limited period of time by purchase from the municipality over whose streets and highways the right is desired. This is because of section- 163 and 164 of the Kentucky constitution. They are in these words:

"SECTION 163. No street railway, gas, water, steamheating, tele-

graph, telephone or electric lighting company within a city or town shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts, or other apparatus along, over or under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted, conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply.

SECTION 164. No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject
105 any or all bids. This section shall not apply to a trunk railway."

These sections limit the power of the legislature to confer such rights. It cannot, of its own volition, confer them at all. It can only empower the proper body or board of the municipality, where the right is desired, to sell the right for a definite period of time not exceeding twenty years. This limited power it still has and the municipality cannot sell the right without being so empowered. So, therefore, though the clause quoted above from section 5 of article I, cannot be construed to confer such a right, in view of these constitutional provisions, possibly it may be construed to confer power to acquire a right for a limited period of time from the municipality where desired, and when obtained, it may be said to have been obtained under the provisions of said act. It is not entirely clear, therefore, that it cannot be properly said that an electric lighting or other company created and organized under the provisions of said act can obtain the right to use the streets and highways of the municipality to enable it to transact its business under the provisions thereof. If this can be properly said, it may be unnecessary to limit the signification of the words in question to the extent claimed, in order to prevent such a wholesale expiry of such rights on said date, and, in that event, though the rights themselves would not then expire, the exclusive feature of such of them as had such feature attached to them would, because, as we have seen, such feature is not obtainable under the provisions of said act. But it is unnecessary to decide or express an opinion as to whether a right to use the streets and highways of a municipality by an electric lighting or other company is obtainable under the provisions of said act by such a corporation created and organized thereunder within the meaning of said clause, or as to whether the words, "powers, privileges or immunities," therein should be limited in their signification, so
106 as to include a right to use the streets and highways of a municipality acquired under legislative authorization. All that complainant's counsel contend in regard to these matters may

be correct and yet the duration of the exclusive feature of the Covington Company's franchise may have been cut down to September 28, 1897, by said clause. That feature was not attached to the privilege of using the streets and highways of the city of Covington contained in the sixth section of the Covington Company's charter. That privilege is thereby conferred upon that company, but it is not made exclusive. Practically it was exclusive in view of the consideration yet to be alluded to. But it is not so provided. That to which the exclusive feature is attached is the privilege of conducting the business of furnishing and supplying the city of Covington and its inhabitants and persons and corporations located near said city with light conferred by the fifth section of the charter. So much thereof as relates to the exclusive feature is in these words:

"The body hereby incorporated shall have the exclusive privilege of conducting the business above described within and adjacent to said city for the term of twenty-five years."

The privilege of so conducting said business may be said to be a naked privilege and not a right in property.

That these two privileges, to wit, that of conducting the electrical business in Covington and that of using the streets and highways of said city for that purpose are separate and distinct privileges, notwithstanding the fact that practically considered the former was of no value without the latter, will appear from the language of Judge Lurton in the case of—

Mayor, etc., of Knoxville *v.* Africa, 77 Fed., 501, he there said:—

"In Tennessee two things seem essential to the legal maintenance and operation of a street railroad, a corporate organi-
107 zation, whereby the franchise essential to the operation of a street railroad for tolls is to be obtained; and the right to enter upon particular streets and occupy them with the necessary tracks and other equipments for the operation of a street railroad. The first requisite can be obtained only from the State by organization under the general incorporation law provided for those wishing such a franchise. To obtain the second requisite, the first essential is that the proper form for such a charter, being sections 1920–1925, inclusive, Mill & V. Code, shall be used. The code provisions referred to authorize the organization of a corporation "for the purpose of constructing a street railroad" in a particular city, to be named in the application. The same statute requires that this application shall set out the termini and general route of the proposed street railroad. Having completed the organization of such a company, it next becomes essential to obtain a right of way upon the streets embraced between the termini named in the charter and included in the route therein described. And again "by such an ordinance, (*i. e.*, one granting right to a street railway company to use its streets by a municipality, pursuant to legislative authority) an incorporeal hereditament is created and vested in the grantee. Until "consent" has been given by ordinance, prescribing the terms upon which the streets desired may be occupied, no street right exists in the railroad corporation. It is a corporation endowed with

the substantial corporate franchise essential to the operation of a street railroad, but it is unable to exercise this franchise because it has no right to enter upon the streets and there construct the necessary tracks and other appliances needful to the maintenance and operation of a street railroad."

The privilege of conducting the electrical business in Covington could, as we have seen, be obtained under the provisions of said act by a similar corporation created and organized thereunder.
108 It is to that privilege and not to the privilege of using the streets and highways of that city for that purpose that the exclusive feature, the immunity from competition, is attached. Such a feature, such an immunity cannot be obtained under the provisions of said act and by the express provisions of the clause in 7 article it stood repealed, on September 28, 1897. The conclusion seems to be irresistible that such was its effect and we feel impelled to *do* hold.

Inasmuch, therefore, as it results therefrom that the Suburban Company by the agreement of consolidation could not possibly have acquired the exclusive feature of the Covington Company's franchise for a longer time than September 28th, 1897, and that time had expired long before the bringing of this suit, it is unnecessary to dispose of the other questions raised in the case. Yet, as they have been considered by counsel, and we have views in regard to them, we are not disposed to dismiss them without consideration entirely. But in view of our conviction in regard to the effect of said repealing clause, as just expressed, we may not deem it essential to express positive convictions as to some of the questions yet to be considered.

The next question presented by this case, disposing of the questions in it in logical order, is as to the effect of section — of act of March 19, 1894, (section 3058–6 Kentucky Statutes.) Did that section have the effect of repealing entirely the exclusive feature of the Covington Company's franchise whose duration had been cut down, as we have held, by act of April 5th, 1893, to the 28th day of September, 1897? Said section is in these words:—

"The general council shall have power by ordinance — to provide by themselves or through others for lighting the streets, public places and buildings and furnishing light to the inhabitants and to regulate the quality and quantity of the light and method
109 and time of and appliances for furnishing the same."

It was under this provision that the defendants were proceeding to erect and operate a municipal electric lighting plant at the time the injunction herein was sued out and it is claimed by them that it authorized such action at any time after the enactment of the charter and, therefore, impliedly repealed the exclusive feature of the Covington Company's franchise. It is well settled that repeals of statutes by implication are not favored and are never admitted where the former can stand with the new act, but only where there is positive repugnancy between the statutes or the latter is plainly intended as a substitute for the former.

The law on this subject is thus stated by Mr. Justice Brower, in the case of—

Rodgers *v.* United States,

decided April 7, 1902, and which will be reported in 184 U. S.:

"It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general, the terms of the general broad enough to include the matter provided for in the special,—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

Applying this principle here, it would seem that there was no such repeal of the exclusive feature of the Covington Company's franchise by the provision in question. And the case of—

City R. Co. *v.* Citizens' Street R. R. Co., 166 U. S., 564,

110 is an authority in support of this position. The Citizens' Street Railway Company of Indianapolis was organized under an act of the General Assembly of Indiana, passed in 1861, and, in pursuance to the provisions thereof, obtained in January, 1864, from the city council of Indianapolis a grant of an exclusive privilege to construct and operate a street railway in said city for a period of thirty years, which was subsequently extended to thirty-seven years. In 1891 an act was passed by said General Assembly empowering the board of public works of said city to authorize street railroad companies to use any street, alley or other public place therein. It was held that this latter act did not repeal of affect, in any way, the earlier one. Mr. Justice Brown, on this point, said:

"Did the act of 1891, known as the new charter, repeal the act of 1861 authorizing the incorporation of railway companies? * * * In other words, should it be construed as an exercise of the power reserved in the 11th section of the act of 1861, to amend or repeal that act at the discretion of the legislature? As the act of 1891 practically established a new power of the legislature over street railway companies in the board of public works of the several cities therein named, subject to the approval of the common council of such cities, perhaps it might be construed to repeal the former, so far as there was a conflict between the two acts; but it certainly should not be construed to act retrospectively or to affect contracts entered into, prior to its passage, unless its language be so clear as to admit of no other construction. While it was doubtless intended to authorize the board of public works of the cities covered by the act to contract for the use of their streets by railway companies, there is nothing from which can be inferred a power to disturb or interfere

111 with contracts already existing; indeed, it is highly probable that it would ever have delegated such a power to a subordinate body."

Besides this, any such affect of the provision in question seems to

have been prevented by another provision of said charter contained in section 3197 Kentucky Statutes, in these words:

"The repeal of any law by the provisions of this act shall not, in anywise, be so construed as to affect any right or liability acquired or accrued thereunder, by or on the part of the city, or any person or body corporate: and this act shall not in any manner affect any right, lien or liability accrued, established or subsisting under and by virtue of previous charters or amendments thereto or ordinances passed thereunder; but such action or proceeding shall be carried on in all respects as if this act had not taken effect; nor shall this act be in anywise so construed so as to affect the right or liability acquired or accrued under previous charters or amendments thereto or ordinances passed thereunder, on the part of the city or any person or body corporate."

Assuming, then, that, at the date of entering into the agreement of consolidation, the Covington Company, to-wit:—April 11, 1894, had the exclusive franchise of furnishing the city of Covington and its inhabitants and persons and corporations located near said city with electric light at least until September 28, 1897, was the effect of said agreement to pass the exclusive feature of said franchise to the Suburban Company, the new and single corporation thereby created? Said consolidation was had under and in pursuance to sections 18, 19, 20, & 21, of article I of said act of April 5,
112 1893. (Section 555, 556, 557, & 558 Kentucky Statutes.) Section 19 (section 556 Kentucky Statutes), is in these words:—

"When the agreement is signed, acknowledged and recorded in the same manner as articles of incorporation are required to be, the seperate existence of the constituent corporations shall cease and the consolidated corporations shall become a single corporation in accordance with the said agreement, and subject to all the provisions of this chapter and other laws relating to it, and shall be vested with all the property business, credits, assets, and effects of the constituent corporations without deed or transfer and shall be bound for all their contracts and obligations."

It will be noticed that the effect of the execution acknowledgement and recording of the agreement of consolidation is five-fold. The seperate existence of the constituent corporations ceases; they become a single corporation in accordance with said agreement; the single corporation becomes subject to all the provisions of said act and other laws relating to it: it becomes vested with all the property, business, credits, assets, and effects of the constituent corporations; and it becomes bound for all their contracts and obligations. The consolidation here provided for is one that involves what has been termed "a death of each constituent company and a birth of a new creature," and not one that involves what has been termed "only a marriage of individuals whose personality continues under certain limitations." As said Mr. Justice Brown in—

Yazoo & M. V. R. Co. *v.* Adams, 180 U. S., 21,

"In short, nothing was left of the constituent companies but the memory of their existence; the mere shadow of a name. But the new company which took its place suddenly sprang into life with a

new corps of officers and a full equipment for the successful operation of the road."

113 The effect of such a consolidation, if nothing in the agreement of consolidation to the contrary, is that the single corporation acquires the property, real, personal and mixed owned by the constituent corporation and that by transmission from them to it. Its effect also may be that it acquired their respective powers, privileges and immunities; their franchises. In the case of—

P. & W. R. Co. *v.* Maryland, 10 How., 376, Mr. Chief Justice Taney said:

"And the law which authorizes these two companies to unite themselves with the plaintiff in error, declares that this new corporation, that is, the Philadelphia, Wilmington, and Baltimore Railroad Company, shall be entitled within this State to all the powers and privileges and advantages at that time belonging to these two companies. It grants it nothing more. Now, as these two companies held their corporate privileges under different charters, the evident meaning of this provision is, that whatever privileges and advantages either of them possessed should, in like manner, be held and possessed by the new company, to the extent of the road they had respectively occupied before the union; that it should stand in their place and possess the power, rights and privileges they had severally enjoyed in the portions of the road which had previously belonged to them. And this intention is made still more evident by the fourth section of the law, which makes the new corporation responsible for the contracts debts, obligations, engagements and liabilities at law or in equity of the several companies and declares that it shall hold and be entitled to all the estate, real, personal and mixed, choses in action, etc., belonging to or due to the several companies."

In the case of—

New Orleans Gaslight Co. *v.* Louisiana Light Mfg. Co., *supra*,

114 the plaintiff company, to-wit, The New Orleans Gaslight Co., was a corporation formed by the consolidation of two other corporations under a statute which provided that the consolidated company should hold and enjoy "all the rights, privileges, powers, franchises and property belonging to each." One of the constituent companies had an exclusive privilege to furnish the city of New Orleans with gaslight for a certain definite period. It was held that the plaintiff company acquired the same right by the consolidation.

But if the effect of the consolidation is that the single corporation acquires all or any of the franchises of the constituent corporations, it does not do so by transmission from them to it. Their franchises expire immediately upon the consolidation. Its franchises at the same moment spring into existence. They come direct to it from the legislature. Any reference to the franchises of the constituent corporations in the statutory provisions in pursuance to which the consolidation is had is by way of describing the franchises to be conferred on the single corporation by the consolidation and not be way of transmitting them or authorizing their transmission from the old to the new.

In the case of—

Shields *v.* Ohio, 95 U. S., 319, Mr. Justice Swayne said:

"The new organization took the powers and faculties designated in advance in the acts authorizing the consolidation; no more and no less. It did not acquire anything by mere transmission. It took everything by creation and grant. The language was brief and it was made operative by reference. But this did not affect the legal result. A deed *inter partes* may be made as effectual by referring to a description elsewhere as by reciting it in full in the present instrument. The consequence is the same in both cases.

And again:

115 "When the consolidation was completed, the old corporations were destroyed; a new one was created, and its powers were "granted" to it in all respects, in the view of the law, as if the old companies had never existed, and neither of them had ever enjoyed the franchises so conferred. The same legislative will created and endowed the new corporation. It did one as much as the other. In this respect, there is no ground for any distinction."

And in the case of:—

Atlantic & Gulf R. Co., *v.* Georgia, 98 U. S., 359, Mr. Justice Strong said:—

"What, then, was left of the old companies; apparently nothing. They must have passed out of existence, and the new company must have succeeded to their rights and duties. But the new company comes into existence under a fresh grant. Not only its being, but its powers, its franchises and immunities, are grants of the legislature which gave it its existence."

Such would seem to be the necessary effect of the decisions of the Supreme Court in those two cases, and also in the following, to-wit:—

Main Central R. R. Co., *v.* Maine, 96 U. S., 499,
St. Louis etc., R'y Co. *v.* Berry, 113 U. S. 465,
Keokuk & W. R. Co., *v.* Missouri, 152 U. S. 301,
Yazoo & M. V. R'y Co., *v.* Adams, 180 U. S. 21.

In the cases of Shields *v.* Ohio, Maine Central R. R., Co., *v.* Maine and Atlantic & Gulf R. R. Co., *vs.*, Georgia, it was held that though the franchises held by one or more of the constituent corporations was inviolable by the legislature that of the single corporation was not. This because there was no transmission from the old to the new and, in the meantime, a constitutional or statutory provision had come into existence reserving power to alter or amend subsequent grants.

In the cases of St. Louis, etc., R'y Co., *v.* Berry,
Keokuk & W. R. Co., *v.* Missouri and
Yazoo & M. R'y Co., *v.* Adams,

it was held that though one or more of the constituent corporations had an exemption from taxation the single corporation had
116 not. This, because there was no transmission from the old to the new and in the meantime a constitutional provision had come into existence prohibiting the grant of such exemptions.

In view of this there would seem to be confusion in the expression of Mr. Justice Brown in the case of Keokuk & W. R. Co., *vs.*, Missouri, *supra*, to-wit:—

"The property and franchises of the prior companies are gone as much as if they had formally surrendered their charters. The new company may doubtless receive by transmission from its constituent companies their property, rights, privileges and franchises, including any immunity from taxation; but it receives them as an heir receives the estate of his ascestor, or as a grantee receives the estate of his grantor, by inheritance, succession, or purchase. The result is not mere union or partnership of two companies, nor the merger of the franchise of one in another, but the extinguishment of one and the creation of another in its place."

Transmission of that which is property irrespective of legislative grant may occur between the old and the new; but not of that which is franchise. This is involved in the statement that the result of such a consolidation is the extinguishment of the constituent corporations and the creation of another corporation in their place. It may be claimed, too, that logically a franchise which is a right in property as, for instance, an easement in the streets and highways of a municipality, which owes its existence solely to legislative grant, will not pass by transmission from the old to the new.

If, then these positions are correct, we have been in error in assuming, at the outset of this opinion, that it was possible to trace the title of the complainant, The Union Company, from the Covington Company. It is not possible for it to go further back
117 than the agreement of consolidation of that company, which resulted in the formation of the Suburban Company. All that goes before is relevant simply for the purpose of determining what and how much the Suburban Company, by virtue of that agreement, acquired from the legislature of Kentucky under the statutory provisions in relation to consolidation, which it could transmit by assignment to the Union Company; this and no more. It acquired no more and no greater franchises than were thereby conferred upon it. Two things must and only two things can be taken into consideration in determining the extent of the franchises so conferred. One is the intention of the legislature as to what franchise should be conferred and the other is what franchises the legislature had power to confer upon said Suburban Company. These are the same matters to be considered in determining what has been acquired under every legislative grant.

Did, therefore, the legislature intend, by the statutory provisions in question, to confer upon a corporation formed by the consolidation of the Covington Company with the other two corporations, as the Suburban Company was formed, an exclusive franchise of furnishing electric light to the city of Covington and its inhabitants and to the persons and corporations located near to said city until September 28th, 1897, assuming that the duration of the like franchise held by the Covington Company had been cut down to that date or until April 22, 1907, assuming that it had not?

It is well settled, that such grants are to be construed strictly. In the case of—

Ruggles *v.* People of Ill., 108 U. S., 536, Mr. Chief Justice Waite said:—

"Grants of immunity from legitimate government control are never to be presumed. On the contrary, the presumptions are all the other way, and unless an exemption is clearly established
118 the legislature is free to act on all subjects within its general jurisdiction, as the public interests may seem to require. As was said by Chief Justice Taney, speaking for the court in Charles River Bridge *v.* Warren Bridge, 11 Pet., 547: "It can never be assumed that the Government intended to diminish its power of accomplishing the end for which it was created." This is an elementary principle."

In the case of—

New Orleans Gaslight Co. *v.* Louisiana, etc., Mfg. Co., *supra:* Mr. Justice Harlan classed an exclusive privilege of the nature in question herein with an exemption from taxation conferred upon a corporation. He said:

"If the State * * * may restrict the exercise of the power of taxation by granting exemption from taxation to particular individuals and corporations, it is difficult to perceive upon what ground we can deny her authority when not forbidden by her organic law—in consideration of money to be expended and important services to be rendered for the promotion of public comfort, the public health or the public safety to grant a franchise, to be exercised exclusively by those who thus do for the public what the State might undertake to perform either herself or by subordinate municipal agencies."

And in speaking of the construction of grants of exemption from taxation, Mr. Justice Brown, in the case of—

Yazoo *V.* M. V. R. Co., *v.* Adams, *supra*, had this to say:—

"Exemptions from taxation are not favored by law and will not be sustained unless such clearly appears to have been the intent of the legislature. Public policy in all the States has almost necessarily exempted from the scope of the taxing power large amounts of property used for religious, educational and municipal purposes; but this list ought not to be extended except for very substantial reasons; and while as we have held in many cases, legislatures may, in the interest of the public, contract for the exemption
119 of other property such contract should receive a strict interpretation and every reasonable doubt be resolved in favor of the taxing power. Indeed, it is not too much to say that courts are astute to seize upon evidence tending to show either that such exemptions were not originally intended, or that they have become inoperative by changes in the original constitution of the companies."

Strictly construing, therefore, as we must, the statutory provisions in question, was it the intention of the legislature of Kentucky that the Suburban Company should have and enjoy the exclusive franchise in question? They may be said to contain two grants. One implied in the provision that the single corporation formed by the

consolidation shall become "subject to all the provisions of this chapter and other laws relating — it, to-wit:—all franchises conferred by said act of April 5, 1893, upon similar corporations originally created and organized thereunder. The other grant is, of "all the property, business, credits, assets and effects of the constituent corporations." These words, no doubt, are broad enough to include the franchises of the constituent corporations. But they certainly are not apt words in which to refer to them. They are words that may be applied to, and usually are applied to other things than franchises.

That the legislation had in mind apt words and words that are usually used to describe franchises is evident from the fact that it uses them in the section from the same act heretofore considered, where provision is made that the powers, privileges and immunities of existing corporations not obtainable thereunder are repealed. For some reason, these words are not used in the grant under consideration. Nor is the word, franchises, used. No grant is
120 made of any exclusive franchise to corporations created and organized under the other provisions of the act. Is it to be held that the legislature intended to confer upon corporations formed out of existing corporations any exclusive franchises without using apt words to describe them, which it then had in mind? We are constrained to say that, at least, we have grave doubts as to whether the legislature by the provision in question intended to confer on corporations formed out of existing corporations any exclusive franchises held by the latter.

Did, then, the legislature of Kentucky have power to confer upon the Suburban Company the exclusive franchise held by the Covington Company?

Treating that franchise as a privilege of using the streets and highways of the city of Covington to enable it to transact the electrical business which, we have seen, it is not, but the privilege of transacting that business and assuming that the Suburban Company, if it acquired it at all, by reason of the consolidation, acquired it directly from the legislature and not by transmission from the Covington Company, which also we have seen is, at least, a possibility, it would seem that the legislature had no power to grant it. Such grant would be in violation of the section- 163 & 164 of the constitution heretofore referred to and quoted by which the power of the legislature in relation to such franchises is restricted to empowering the municipalities to sell them for a limited period of time.

But treating the exclusive franchise as it really was, to-wit, the privileges of transacting the electrical business in the city of Covington and adjacent thereto, if the legislature intended to grant it to the Suburban Company, was it or not special and local legislation within the prohibition of section 59 of the constitution of Kentucky?

121 In the case of—

Citizens' St. R. Co., *v.* City of Memphis, 53 Fed., 715, Judge Hammond said:—

"How can the legislature by a general or special law grant privi-

leges and immunities to old corporations not granted to any that are new, or to new corporations made out of old ones not granted to new corporations made *de novo*,—if this legislation for consolidation is to be taken as a general law, having the effect to create an absolutely new corporation, stripped of its old charters, and the old charters extinguished? We must not be confused by terms. Such a law would be a special act, in effect, though general in appearance; granting to one class of citizens the fortunate possessors of old charters, namely—special privileges, not granted to a less fortunate class of citizens,—those possessing new charters under the general law, namely. The legislature, under such a construction of this provision of the constitution as the city claims, would have no more power to confer, by general law or otherwise, upon a new corporation made by consolidation out of old corporations, special privileges, than upon any other class of citizens, nor could it do this by reference to the old charters for a description of the privileges conferred more than by an apt description *de novo*—nor would the privileges so conferred be any less special because they are similar to, or identical with, other privileges conferred upon other companies by general or special law. They would come of a special law, in fact, however, large or general might be its application to special individuals coming under it. The largeness of the class would
122 not make class legislation any less special, and this is what is forbidden by the constitution."

We are constrained to say here that, at least, we have grave doubts as to whether the legislature of Kentucky had the power to confer upon the Suburban Company the exclusive franchise in question even if it intended to do so.

Our conclusion, as to this point of attack upon the title asserted in behalf of the Union Company to the exclusive franchise in question, therefore, is, that, whether the legislature had the power to confer it upon the Suburban Company and intended to do so by the provisions of the act of April 5, 1893, in relation to the consolidation of corporations, the exclusive franchise which the Covington Company then had and which the Suburban Company thereby acquired was limited to September 28th, 1897, by that provision of said act, which brought it in relation to existing corporations and was intended to secure uniformity between them and those to be created and organized thereunder, and that upon that date it expired.

The remaining point of attack upon the title of the Union Company is, at the transfers by which it is claimed that the exclusive franchise of the Suburban Company, assuming it to be until April 22, 1907, passed to the Union Company.

It is urged that the Suburban Company had no power to transfer and assign that franchise to any other person or corporation, because there is no legislative authority permitting it to transfer and assign it, and that, therefore, the Union Company has no such franchise.

It is conceded by complainant's counsel that, as a general rule, legislative authority is essential to enable a corporation to transfer and assign its franchises. They contend, however, that if it be true

that the Suburban Company had no power to transfer and
123 assign said franchises, it is still in said company, and all of the original parties to the suit remain parties thereto. This is true, but the Suburban Company was never a party to the suit. It was originally brought by its assignee in bankruptcy and thereafter the Union Company was made a party complainant also.

The parties complainant all claim as assignees of the Suburban Company and it would seem, therefore, to be necessary to uphold its right to assign in order that they be entitled to relief herein.

Again, it is urged by complainant's counsel that if the act of the Suburban Company was *ultra vires*, it cannot be attacked collaterally at all, and, directly, only by the State. This is true if the question is whether the Suburban Company has suffered forfeiture of its franchises by reason of section 205 of the constitution of Kentucky or sec. 569 Kentucky Statutes, providing that when a corporation has been guilty of an abuse or misuse of its corporate powers, forfeiture proceedings may be instituted against it, but it is not true when the question is whether the franchises of the Suburban Company have been acquired by the Union Company, by virtue of said *ultra vires* act.

Again, it is urged that where a corporation is incompetent by its charter to take title to real estate, a conveyance to it is not void, but only voidable and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. This, also is true. But the question here is not as to the power of the assignees to take title, but of the assignor to pass title. In the case supposed, if the grantor who made the deed to the corporation that had no power to take, had no title to the real estate, it could not recover possession thereof from a party in possession, notwithstanding he could not question its right to take title.

124 Again, and finally, it is urged that though the general rule is as stated as to power of a corporation to assign its franchises to do, that rule does not prevail in Kentucky, by the law of which, in this respect, this court is bound.

It is claimed that in this State a corporation has a right to transfer and assign its franchises to do without express legislative authority. In support of this contention, the case of

Maysville *v.* Boone, 2 J. J. Mar., 227.

McCauley *v.* Givens, 1 Dana, 261.

two early decisions of the court of appeals of Kentucky, which decide that a franchise to operate a ferry are relied on. Those decisions do hold that. In investigating this question, I have seen it stated somewhere that ferry franchises are assignable at common law. I have not investigated that question, and so far as they are concerned, it may be that they are assignable everywhere.

In the case of—

Jouett *vs.* Lewis, 4 Litt., 160,

wherein it was decided that the vendee of a turnpike was held liable on a covenant to repair where there was no legislative authority to make the sale is also cited. The question, however, as to the right to make the lease does not seem to have been considered.

Reliance is also had on the case of—

The Bardstown & Louisville R. R. Co., *vs.* Metcalfe, 4 Met., 199,

where it was decided that a railway corporation has power to mortgage its franchise though there was no express authority contained in the charter to do so. The court, however, held this, because there was a power to borrow money contained in the charter from which the power to mortgage to secure the money borrowed should be implied. That is the real ground of that decision, though in the course of the opinion, Judge Bullitt does intimate that
125 franchises of corporations are assignable without express legislative authority and relies on the early cases heretofore referred to and commented on.

Counsel also rely on the recent case of—

The Covington Gas Light Co. *vs.* The City of Covington, 22nd. Ky. Law Rep., p. 796.

That was a case where the City of Covington had an option to purchase from the Covington Gas Company its works and the right to operate those works. This option the City of Covington sold and transferred to the Suburban Company, the same corporation about which we have been writing, and the question involved in that case was both as to whether or not, the Suburban Company had the right to buy, and, on the other hand, as to whether, or not, the City of Covington had the right to sell. It was adjudged that the City of Covington did have the right to sell; the ground of said right being based not upon any legislative authority contained in the charter of the city of Covington, but upon the ground that the option was property. This case comes very near deciding that a franchise similar to the one involved in this case is assignable, without legislative authority. It would seem that an option to purchase a franchise of this character was assignable by a corporation that had it, without legislative power to do so, that the right to assign the franchise itself would exist. The case, however, is not exactly upon all fours with this one.

Counsel for complainant also rely upon certain constitutional and statutory provisions that seem to recognize in a corporation a power to assign its franchises. They refer to section 203 of the Kentucky constitution, which is in these words:—

"No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the
126 liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges."

That seems to imply that franchises are assignable. This recognition, however, may have been due to the fact that in the charters of existing corporations there may be express powers to assign. I do not think, therefore, that this constitutional provision may be treated as a recognition of existing law to assign without legislative authority.

Counsel also refer to certain provisions in the act of April 5, 1893, which provisions have been under consideration as seeming

to imply that corporations have power to assign their franchises; but, in view of the consideration just referred to, it can hardly be said that they go to the extent of recognizing that they can be assigned without legislative authority.

These are authorities in favor of the position as to the right to assign and transfer without legislative authority. On the other hand, in the case of—

The Winchester & Lexington Turnpike R. Co. *vs.* Vimont, 5 B. M. I.,

referred to in the Bardstown case, it is distinctly held that the franchises of a turnpike corporation cannot be sold at forced sale to pay a debt. And, although the doctrine of that case was questioned in the Bardstown case, it has been followed in a number of decisions since. It was followed in two cases in I Ky. Law Reporter, where it was held that a turnpike franchise cannot be made the subject of a sale even to pay its debts in the absence of special legislation allowing it. Such is the well settled law of this State.

Turnpike Co. *vs.* Benjamin Smith, trustee, I Ky. L. R., 68.
Old State Road & Ripple Turnpike *v.* Smith, I Ky. L. R., 125.

In the case of—

The Louisville Water Co. *vs.* Hamilton, 81 Ky., 517.

127 the same was held with reference to the franchise of a water company.

Judge Pryor said:—

"This corporation, like a turnpike or railroad, cannot be seized and sold by a collecting officer or the property necessary for its use, so as to deprive the public of the benefits to be derived from it, unless by legislative authority."

Here are four distinct decisions to the effect that the franchises of a corporation cannot be sold at an involuntary sale under execution or other process. In the case that involved the consolidation of the Louisville & Nashville Railroad Company and the Chesapeake and Ohio South-Western, which was decided by the Kentucky court of appeals and by the Supreme Court of the United States on writ of error, although the point decided in the case was that there was no power in the Louisville & Nashville Railroad Company to purchase the property and franchises of the other company at the judicial sale, because such a purchase would be in violation of the prohibition of the constitution of Kentucky against the consolidation of parallel or competing lines, yet the Supreme Court of the United States does take and consider the question both as to the legislative authority of the Louisville & Nashville Railroad Company to buy and of the Chesapeake & Ohio South-Western Railroad Company to sell. The Kentucky court of appeals in the case of McCabe's Administrator *vs.* The Maysville & Big Sandy Railroad Co., decided March 5, 1902, and reported in 66th S. W., 1055, had before them the question as to whether or not the Chesapeake & Ohio and the Maysville & Big Sandy Railroad Company could be joined in the same suit for a tort of the former, the Chesapeake & Ohio being the lessor and the Mays-

128 ville & Big Sandy the lessee. If the Maysville & Big Sandy Railroad Co., had no power to lease they could be joined, and if

it did have the power to lease, according to a great many authorities they could not be joined. The court of appeals in this case decided that the Maysville & Big Sandy did have power to lease and that, although this was so, yet the two corporations could be joined for a tort committed by the lessee. But in the course of the opinion it took up and considered the question as to whether, or not, the Maysville & Big Sandy Railroad Co., had legislative authority to lease, assuming that that was an essential fact in the case. They took up and considered the various statutory provisions relied on as conferring authority to lease and they concluded such power was granted to the Maysville & Big Sandy Railroad Co., to make the lease with the Chesapeake & Ohio Railroad Co., above referred to, but as no exemption was granted from any liabilities which attached to the lessee such an exemption as against the public would not be implied, Judge Hobson then said:

"This franchise—that is, the franchise of the Maysville & Big Sandy Railroad Co., it could not transfer to another without distinct legislative authority. A grant of power to lease its property is one thing and a grant of absolution from its responsibilities is another, and is not to be inferred from the mere power to lease a railroad where the corporation still retains its custody and the enjoyment of its franchise and rents, for such grants are strictly construed and as against the public are never extended by construction. In the case before us, there is only a grant to the lessor to operate and to contract for the operation of the road. The company enjoys all its franchise under the contract. There is nothing in the pro-
129 vision to show that the legislature had in mind authorizing the company to divest itself of its franchises, or permitting it, while enjoying them or their fruits, to be acquit of responsibility for their abuse without regard to the financial ability of the lessee or his ability to sue."

That case is based upon the idea that legislative authority to lease is necessary.

There is room therefore, here, for a reconciler of these cases pro and con, or for one to lay down some definite rule that will apply as to an electric light company, as well as a steam railroad company that will apply to an involuntary sale as well as a voluntary sale. To my mind, it is uncertain as to what the exact law in Kentucky is as to whether or not a corporation that has no legislative power to sell its franchises has power to make a transfer or sale therein. Possibly, in view of the fact that the decisions of the Supreme Court of the United States are unqualifiedly to the effect that no power to sell exists unless there is legislative authority, and the almost uniform trend of authority elsewhere is to the same effect, and of the seeming conflict in Kentucky, if it was necessary for me to decide the question, I might hold that there was no power in the Suburban Company to sell its franchises. But it is not necessary and all I will say is, that at the least, I have grave doubts as to its right to sell.

Now I believe these are all the questions that have been raised and discussed in the case. My decision is based solely upon the propo-

sition that section 573 of the Kentucky Statutes had the effect to cut down the exclusive feature of the franchise of the Covington Electric Light Company to September 28th, 1897.

I would add that in regard to the jurisdiction of this court—a matter that I suggested myself—it is settled that it has juris-
130 diction not only by authorities referred to by counsel, but also by two recent decisions, one by the Supreme Court of the United States, the other by the circuit court of appeals of the sixth circuit, neither of which has yet been reported.

My decision then is—and I feel constrained to it by force of the argument—that the petition should be dismissed.

A. M. J. COCHRAN, *Judge.*

June 17th, 1902.

131 Afterwards, to-wit:—on October 7, A. D., 1902 an opinion of court was rendered clothed in words and figures following, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

CHAS. H. SHAW ET AL.
vs.
CITY OF COVINGTON ET AL.

1. Counsel for complainant have been reheard in regard to the questions involved in this case and have directed my attention to the decision of Judge Evans. Upon the application for temporary injunction herein. It was not in the papers when I considered this case before and I was not aware of its contents. How far comity would have required that I should add here to the positions therein taken, had I known of them I am not prepared to say. But having considered and disposed of the case upon my own view of its merits I do not think I should treat of it otherwise now.

As I understand Judge Evan's opinion, it is simply that the exclusive privilege of transacting electric lighting business in the city of Covington granted to the Covington Co., was not subject to repeal in so far as its exclusive feature was concerned by the legislature of Kentucky, in pursuance to the reserved power of repeal contained in the act of 1856. He does not hold that, conceding that the legislature had such power, sec. 573 of Kentucky Statutes would not have the effect of repealing that feature of said grant. On the contrary, it may be implied from what he says that if he had considered that the legislature had such power he would have held that sec. 573 did have that effect. He says:—

"The claim here is not that there was a mere privilege
132 of supplying electric light, but that there was a contract for that purpose which was to continue for the full terms of 25 years, which had for its consideration the public service to the city and the expenditures stated. The court thinks that if there existed a mere privilege power or immunity without any consideration such as the rendition of a public service and the expenditures of large

sums of money for the purposes alluded to, that that mere privilege, power or immunity would probable be abrogated by the operation of sec. 573, Kentucky Statutes, but as there is here a contract under the decisions just quoted, based upon the consideration already indicated, that contract was still in full force and cannot be impaired by the defendants in the way proposed. There is a marked distinction between a mere privilege power or immunity and a contract, as regards the operation of sec. 573, as to the former the case of Nall *v.* Williams, lately decided by the Kentucky court of appeals could apply, but to the latter it cannot."

2. Counsel for complainant have not caught the point I attempted to make in referring to the fact that what was granted to the Covington Co., exclusively,was not the right to use the streets and other highways of the city of Covington, but the right to transact business in said city and its vicinity. I did not take the position that that fact made the exclusive feature of the Covington Company's grant not a matter of contract between the State of Kentucky and said Co.

They had contended that the words "powers, privileges or immunities" in sec. 573 Kentucky Statutes, meant naked "powers, privileges or immunities" and not such as had been exercised before the passage of the chapter of which said sec. is a part. The ground upon which they so contended was this: A gas, electric lighting, water, telephone, telegraph or street car Co., organized under
133 the provisions of said chapter could not acquire thereunder or by virtue thereof the right to use the streets or other highways of the municipality where it was organized to transact business to enable it to do so. That is said provisions did not confer such right upon them. It was not claimed that such a Co., could not acquire such right, simply that the provisions of said chapter were silent on the subject and if it could be acquired at all it must be under other authority than said chapter. This being so, it is urged that if the words "powers, privileges or immunities" in the said section included such as had been exercised before the passage of said act the rights of all the gas, electric lighting, water, telephone, telegraph and street car companies in Kentucky to use the streets and other highways of the municipalities in which they were respectively located then in use and upon the faith of which investments had been made would expire on September 28th, 1897, assuming that the legislature had power to terminate them. Such a wholesale expiring of valuable rights, it was contended could not possibly have been intended by the legislature. And in order to prevent the language used having such meaning said words should be restricted to such as had not been theretofore used and were, therefore, mere naked powers, privileges or immunities. In other words, the argument was; in order that a provision in an existing charter should be affected by the second clause of the repealing part of said section two things were essential. One was that what it conferred should be a power, privilege or immunity within the meaning of those words as there used, and the other, that it should not be obtainable under the provisions of said chapter by a similar corporation organized thereunder.

Such a right was not so obtainable, therefore, in order to prevent said clause having such a deleterious effect, the signification
134 of said words should be limited to naked powers, privileges or immunities, *i. e.*, such as had not theretofore been exercised. If so limited, of course the exclusive feature of the Covington Company's grant, as well as the grant itself, was saved from being affected by said clause. This was the argument of complainant's counsel as I understood it to be. Now in answer to this argument I suggested that it was not necessary in order to prevent said clause having such a deleterious effect, assuming that the legislature had power to bring it about to limit the meaning of said words to mere naked powers, privileges or immunities all that was necessary to do was to exclude from their significations grants or rights to use the streets or other highways of a municipality which were in their nature easements. By so doing, existing corporations would not be affected by said clause either as to their right to transact business or to use the streets and other highways of the municipality where located for that purpose. If, then, it was necessary to put some limitation upon said words to prevent their having an effect that could not have been intended and such was the proper limitation to put on them then the right to exclude others the exemption from competition granted to the Covington Co., came within the signification of said words as used in said clause and was repealed on said date: for it was annexed to the grant of the right to transact business in the city of Covington and in its vicinity and not to the right to use the streets and other highways of said city. This point may or may not have been well taken. But such is the only ground upon which it was made. And it is immaterial whether it was well taken or not, because, as I understand the contention of counsel for complainant on the rehearing the argument against which it was
135 urged has been abandoned and it is now contended that the right to exclude others an exemption from competition can be obtained by a corporation similar to the Covington Co., under the provisions of said chapter.

3. Of course if this is so, then the exclusive feature of the Covington Company's grant was not affected by said clause. But is this so? It is certain that an electric lighting company can be organized under the provisions of said chapter to transact the electric lighting business in the city of Covington and its vicinity, and that such a company, leaving out of consideration the exclusive grant in question can acquire the right to use the streets and other highways of said city to enable it to transact such business under sec. 163 & 164 of the constitution of Kentucky. And it is contended that under said sections it can acquire the exclusive right of so using said streets and other highways. I do not deem it necessary to determine this question but will assume that this is so. Such a right, however, so acquired is not obtained by it under the provisions of said chapter, but under the provisions of said sections of the constitution.

Again, if an exclusive right is obtainable under said sections it is the exclusive right of using the streets and other highways of a municipality and not the exclusive right of transacting business within

said municipality as in this case. And still further it is an exclusive right obtained by purchase at public sale. The exclusive right obtainable under said sections if such right was obtainable at all thereunder, was obtainable by the Covington Company, notwithstanding the repeal of exclusive right contained in its charter. The sole effect of the repeal was to put it upon the same level as similar corporations organized under said chapter.

4. It is argued that the exclusive feature of the Covington Company's grant is not an immunity or privilege. It is not dis-
136 cussed whether or not it is a power. It is further contended that the exclusive feature of the Covington Company's grant cannot be considered as something separate and apart from the grant itself. That it is something separate and apart therefrom and it is proper so to consider it may be gathered from Mr. Justice Brewer's remarkes in the case of—

Bienville Water Supply *v.* The City of Mobile, decided June 2, 1902 which may be found reported in adv. sheets of U. S. S. C., October term 1901, page 820. He there says:

"The possible rights of a corporation group themselves into three classes:—

1. The right to tangible property which it may acquire.

2. The right to do the specific things which are named in the charter, and—

3. The right to exclude others from doing like things."

Then after referring to the first and second clauses, he says:—

"The remaining classes *is* of those rights which flow from exclusive provisions in the charter the right to prevent others from doing the same things. It cannot be doubted that such a right is valuable that, for instance, it may be worth something to the plaintiff to have, not only the right of supplying Mobile with water, but also the right to exclude others, and thus prevented all competition. That which gives to a government patent for an invention, its chief value is not the right to manufacture and sell the thing invented, but the right to exclude others from so doing the monopoly for the prescribed term of years."

It must be conceded, therefore, that the exclusive feature of the Covington Company's grant is something separate and apart from the grant itself and may be so considered. It is a right to exclude others from doing the same business in the city of Covington an exemption from competition. Is this right or exemption then an immunity or privilege or power?

Counsel for complainant argue that it is not an immunity
137 because immunity according to its etymological signification means an exemption from the performance of some affirmative duty otherwise resting upon the person in question and they cite definitions from Bouvier and Anderson's Law Dictionaries and from Webster to that effect. But such is not the only meaning. It has a secondary and wider meaning of "freedom" or "exemption" and is so defined in the Imperial Dictionary, which quotes in support of it the following phrase from Dryden, to-wit:—"Immunity from errors" and the following from Cowper "A long *a*mmunity

from grief or pain." And it is quite common to refer to one who is free from liability to yellow fever as an "immune." It, therefore, cannot be said that "immunity" is not a proper word to describe an exemption or freedom from competition. It no doubt more aptly applies to an exemption from taxation but an exemption from competition is within its broader signification. Then looking at an exemption from competition as a right to exclude or prevent others from doing the same thing, the language used by Judge Brewer, in describing it, it may be said to be a power and to come within the meaning of the word, powers, as used in said section. It is certainly a privilege, I feel quite sure, therefore, that it is embraced by the words "powers, privileges and immunities."

5. The really serious question bearing upon the effect of sec. 573, Kentucky Statutes, in my opinion, is as to the power of the legislature of Kentucky to repeal the right of the Covington Company to exclude others from transacting the electric light business in the city of Covington for the twenty-five years period provided in its charter. And the question here is whether such right is a right previously vested within the meaning of the proviso in the act of 1856. I have already given my reasons for believing that it is not and to this opinion I adhere. I desire to add, however, to avoid any misconstruction of what I have had to say, that, in my opinion, a
138 right to use the streets and other highways of a municipality which has been exercised and upon the faith of which investments have been made and which is in its nature an easement, a right in property, an incorporeal hereditament, is a right previously vested, within the meaning of said proviso and protected by it from the power of the legislature to repeal such right, and it may be that an exclusive grant of such a right is also thereby protected as to its exclusive feature. But the exclusive right of transacting business in the city of Covington and its vicinity granted the Covington Company, is a pure franchise, though investments have been made on the faith of it and though a contract between the State and Covington Company subject to the repealing power of the legislature, the same as an exemption from taxation under like circumstances.

6. Further reflection has convinced me that the Surburban Co., did not acquire the exclusive feature of the Covington Company's grant by virtue of the consolidation and that for the reasons already stated. I refer to the matter here in order to state that my conclusion herein is based upon this ground as well as the ground that the exclusive feature of said grants was repealed sec. 573, Ky. Stat. I do not think, however, that the two grounds are disposed of by the same considerations as intimated by counsel for complainant.

7. The motion of the Surburban Company to file a bill in the nature of a supplemental bill is sustained.

October 7, 1902.

A. M. J. COCHRAN, *Judge.*

Afterwards to-wit, on October 14, A. D., 1902, an entry was made upon the journal of this court in words and figures, to-wit:—

139 Journal "I," page 569.

This cause coming on to be heard on the motion of the Suburban Electric Co., for leave to file a bill in the nature of a supplemental bill, and to be made a party herein, on consideration whereof, the court grants said motion and orders that the said bill in the nature of a supplemental bill be filed, and the said Suburban Electric Co., made a party complainant herein, which is accordingly done. To which the defendants object and except.

Said motion for leave to file bill in the nature of supplemental bill, referred to is the foregoing entry, was and is in words and figures following, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

CHAS. H. SHAW, Trustee, etc., *vs.* CITY OF COVINGTON ET AL. } Motion of the Suburban Electric Co. for Leave to File Bill in the Nature of a Supplemental Bill.

To the honorable judges of the circuit court of the United States, district of Kentucky:

Now comes the Suburban Electric Co., a corporation, and moves the court for leave to file bill in the nature of supplemental bill, and to become party complainant hereto, on the ground that since the filing of said suit, it has acquired the rights of the complainant herein, which are the subject of his bill in equity.

FORAKER, OUTCALT, GRANGER & PRIOR,
ERNST, CASSATT & McDOUGALL,
Counsel for Suburban Electric Co.

140 Said bill in the nature of supplemental bill referred to in the foregoing entry was and is in words and figures following, to-wit:—

CHAS. H. SHAW, Trustee, etc., *vs.* THE CITY OF COVINGTON ET AL. } Bill in the Nature of a Supplemental Bill of the Suburban Electric Co., a Corporation.

Your orator The Suburban Electric Co., by leave of court first had, files this, its bill in the nature of supplemental bill in the above entitled cause against the parties thereto, and says:—

That it is a corporation created and existing under the laws of the State of Kentucky; that theretofore, to-wit:—on or about the 10 day of April, 1900, Charles H. Shaw, trustee in bankruptcy of your orator, filed his bill of complaint herein, setting forth that the Suburban Electric Co. was the owner of an exclusive privilege to enter in and upon the streets and public places of the city of Covington, and there lay its pipes and mains, and there erect its poles, wires and posts through or along any street or highway of the city of Coving

ton or adjacent thereto, as it might see fit, and generate and supply to the city of Covington and its inhabitants, persons and corporations, located in and near said city, light and motive power generated by electricity to the city of Covington and such individual- and corporations contracting with each for such prices and compensation as might be agreed upon by said Co., and such individuals and corporations, and the exclusive privilege of conducting the business as before described within and adjacent to the said city for the terms of 25 years from the — day of April, 1882:—

141 That the said Suburban Electric Co. was adjudged a bankrupt in the U. S. district court, in the district of Kentucky — day of December, 1899, and that on the — day of ——, 1900, said complainant was duly elected and qualified as said trustee of said Suburban Electric Company, in bankruptcy, and at the time of the filing of said suit was in possession of all the rights, privileges, and franchises owned and controlled by the said Suburban Electric Company, and was engaged in the business of furnishing light, heat and power generated by electricity to the City of Covington, and the citizens thereof, and was in exclusive possession, control and ownership of said exclusive privilege hereinbefore referred to, all of which is fully set forth in said bill:

And thereby praying that the said City of Covington, and said Johnson, its mayor, might be restrained and enjoined from taking and steps to issue said bonds on behalf of said City of Covington for the erection of an electric light plant by said City of Covington, all as set forth in the bill heretofore filed herein:

And your orator further shows that a writ of subpœna issued out of and under the seal of this honorable court to the defendant in said bill, and that pending final determination of said cause, a preliminary injunction and restraining order was granted enjoining said defendants as prayed for in said bill:

And your orator further shows that since the filing of said bill and the granting of said injunction and preliminary restraining order as aforesaid, the said complainant, trustee in bankruptcy, has been discharged, and all the property, rights and franchises of said The Suburban Electric Company have been restored to it.

142 Your orator further shows, that by virtue of being the owner of said exclusive privilege, and being in full control and possession of same, it is entitled, in its behalf to the relief prayed for by said complainant in said bill.

To the end, therefore, that said defendants may be enjoined and restrained as prayed for in said bill, and that the preliminary injunction and restraining order hereinbefore granted, shall be continued in force in your orator's behalf, pending a final hearing of this cause:—

May it please your honor, to grant unto your orator a writ of subpœna directed to the said Charles H. Shaw, trustee in bankruptcy, as aforesaid, the said City of Covington, and William A. Johnson, mayor of the city of Covington, commanding them, at a suitable time and place, to appear before your honor and make answer and

promise to abide by and perform such decree as to your honor shall seem meet.

FORAKER, OUTCALT, GRANGER & PRIOR,
ERNST, CASSATT & McDOUGALL,
Counsel for Suburban Electric Company.

And thereafter on the same day, to-wit:—on October 14th, A. D. 1902, an entry was made upon the journal of this court, clothed in words and figures following, to-wit:—

Journal "I," page 570.

This cause coming on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the relief prayed for in the bill herein, be denied, that the bill be dismissed. And the plaintiffs having given notice of appeal, it is ordered that the injunction hereinbefore granted be continued in force pending said appeal.

142*a* And on the same day, to-wit:—on October 14th, A. D. 1902, an entry was made upon the journal of this court, clothed in words and figures following, to-wit:—

Journal "I," page 570.

And now, to-wit, on the 14th day of October, A. D. 1902, it is ordered that the appeal prayed by the plaintiffs herein be allowed and the appeal bond is fixed at $1000.00. And it is ordered that the injunction hereinbefore granted herein, be continued in force pending said appeal, until the final judgement and decree of said circuit court of appeals.

And now come the complainants and offer bond in the sum of $1000, with the National Surety Company as surety which is approved.

Said petition for appeal referred to in the foregoing entry, was and is in words and figures following, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

CHAS. H. SHAW, Trustee, etc.,
vs.
THE CITY OF COVINGTON ET AL.

The above named plaintiffs, conceiving themselves aggrieved by the decree made and entered on the 14th day of October, 1902, in the above entitled cause, do hereby appeal from said order and decree to the United States circuit court of appeals for the sixth circuit, for the reasons specified in the assignment of errors which is filed herewith, and pray that this appeal may be allowed, and that

a transcript of the record proceedings and papers upon which
142b said order was made, duly authenticated, may be sent to the United States circuit court of appeals for the sixth circuit.

FORAKER, OUTCALT, GRANGER & PRIOR,
ERNST, CASSATT & McDOUGALL,
Attorneys for Plaintiffs.

Said assignment of errors referred to in the foregoing entry, was and is in words and figures following, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

CHARLES H. SHAW, Trustee, etc., *vs.* THE CITY OF COVINGTON ET AL. } Assignment of Errors.

Now come the plaintiffs in the above entitled cause and file their assignment of errors with the petition for appeal herein, and say that the decree in said cause is erroneous and against the just rights of said complainants for the following reasons:—

1. The court erred in rendering judgement for the defendants, when judgement should have been rendered for the plaintiffs.

2. The court erred in finding that the exclusive feature of the franchise of the Covington Electric Light Company did not pass to the Suburban Electric Company in the consolidation, by which said Suburban Electric Company was formed.

3. The court erred in finding that the exclusive feature off the said franchise of the Covington Electric Light Company was repealed as of September 28, 1897, by section 573 of the Revised Statutes of Kentucky.

4. Other erro-s appearing upon the record.

142c Wherefore, said plaintiffs pray that said decree be reversed, and that the said court be directed to enter a decree in accordance with the prayer of the bill.

FORAKER, OUTCALT, GRANGER & PRIOR,
ERNST, CASSATT & McDOUGALL,
Attorneys for Plaintiff.

And on the same day, to-wit:—on October 14th, A. D. 1902, a bond on appeal to the circuit court of appeals was filed herein, clothed in words and figures following, to-wit:—

Know all men by these presents, that we, The Union Light, Heat & Power Company, as principal, and The National Surety Company, as sureties, are held and firmly bound unto the City of Covington, and William A. Johnson, mayor of said city of Covington, in the full sum of one thousand dollars, to be paid to the said the City of Covington, and William A. Johnson, mayor of said city of Covington, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our

heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourteenth day of October, in the year of our Lord, one thousand nine hundred and two.

Whereas, lately at a term of the United States circuit court for the eastern district of Kentucky, at Covington, in a suit depending in said court, between Charles H. Shaw, trustee, The Union Light, Heat & Power Co., and The Suburban Electric Co., complainants, and The City of Covington and William A. Johnson, mayor of said city of Covington, a judgement was rendered against the said The Union Light, Heat & Power Co., Chas. H. Shaw, trustee and The Suburban Electric Co., and the said Chas. H. Shaw, trustee, The Union Light, Heat & Power Co., and the Suburban Company having ob-
142*d* tained a transcript and filed a copy thereof in the clerk's office of the said court to reverse the judgement in the aforesaid suit, and a citation directed to the said City of Covington and William A. Johnson, mayor of said city of Covington, citing and admonishing them to be and appear at a session of the United States circuit court of appeals, for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the — day of —— next.

Now, the condition of the above obligation is such, that if the said Charles H. Shaw, trustee, The Union Light, Heat & Power Co., and The Suburban Electric Co., shall prosecute said appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void: else to remain in full force and virtue.

THE UNION LIGHT, HEAT & POWER CO.,
By FORAKER, OUTCALT, GRANGER & PRIOR. [SEAL.]
ERNST, CASSATT & McDOUGALL, *Attorneys.*
NATIONAL SURETY COMPANY,
By JOHN T. ROUSE, *Res. Vice-President.*

Attest: A. H. SINGER,
Res. Assistant Secretary.

Sealed and delivered in presence of—
I. S. SELLERS.
J. W. MENZIES.

And on the same day, to-wit: on October 14th, A. D. 1902, the following citation issued herein, clothed in words and figures following, to-wit:—

142*e* United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

To the City of Covington and William A. Johnson, mayor of the city of Covington, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the

12th day of November, next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Kentucky, at Covington, wherein The Union Light, Heat & Power Company is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgement rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 14th day of October, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America the one hundred and twenty-seventh year.

A. M. J. COCHRAN,
District Judge.

142*f* And on a day following, to-wit:—on November 10th, A. D. 1902, an entry was made upon the journal of this court clothed in words and figures following, to-wit:—

Journal "I," page 601.

On application of the clerk and for good cause shown, it is now ordered that the time within which transcript of proceedings had herein shall be filed in the circuit court of appeals for the sixth circuit, be and the same is extended thirty days from the 12th day of November, A. D. 1902.

And on the day following, to-wit:—on November 11th, A. D. 1902, the citation issued herein on October 14th, A. D. 1902, was returned and filed, bearing the following endorsement, viz:—

"Service of within accepted for defendants in error.

F. J. HANLON,
Solicitor for City of Covington.

The following are the depositions filed and published under said order of December 17th, 1901—Journal I page 263—and appearing on page (58–*a*) of this record.

143 United States Circuit Court for the Eastern District of Kentucky.

CHAS. H. SHAW, Trustee, etc., Complainant, vs. THE CITY OF COVINGTON ET AL., Defendants. } No. 2212. Depositions in Behalf of Complainant.

The depositions of Archibald Stuart, Charles H. Shaw, Ben Macke, and Alexander M. Worthington, taken by agreement and without notice, on behalf of the complainant, beginning on this 30th day of November, 1901, and thereafter as adjourned, at the office of Ernst & Cassatt, First National Bank building, N. W. C., Third & Walnut streets, Cincinnati, Hamilton county, Ohio, in an action pending and undetermined in the circuit court of the United States for the eastern district of Kentucky, wherein Charles H. Shaw, trustee, etc., is complainant, and The City of Covington *et al.*, defendants, the said depositions by agreement of the parties by their attorneys present being taken in shorthand by an expert stenographer and afterwards reduced to typewriting, the signatures of the said witnesses thereto being waived by stipulation between the parties by their respective counsel present.

Present: Ernst & Cassatt, and Outcalt & Prior, representing the complainant; and F. J. Haulon, city solicitor, representing the defendants.

144 The said witness, ARCHIBALD STUART, of lawful age, being first duly cautioned and sworn, deposed and testified as follows:—to-wit:—

Direct examination by Mr. OUTCALT:

1 Q. Please state your name, residence and vocation.

A. Archibald Stuart; Fernbank, Ohio; not in any active business at present.

2 Q. Were you ever connected or identified with the corporation known as the Covington Electric Light Company; and if so, please state when you became connected or identified with that company; and what relation you sustained to it?

A. I became a stock-holder in the Covington Electric Light Company some time in the early part of 1891; I cannot give the date. I was a director.

3 Q. You were elected a director of the company?

A. Yes, sir.

4 Q. Did you continue to sustain that relation to the company up to the time of its consolidation with the other two constituent companies into the Suburban Electric Company, in 1894?

A. I think I was a director during the entire time; I would not be absolutely positive of it; but I think I was.

5 Q. You were a stockholder all that time, were you not, up to the time of the consolidation in 1894?

A. Yes sir.

6 Q. Were you at all active in its affairs?

A. Well, to some extent, yes. I was in the electrical business; and I was active to the extent of advising with them, etc.; but not what you call an active officer in the company, such as secre-
145 tary or treasurer or president, anything of that kind.

7 Q. Did you attend the meetings of the board of directors as they were held from time to time?

A. Not all of them; but I was very busy those days, attended whenever I could.

8 Q. Did you keep yourself advised of the conduct of its affairs, as a director?

A. Yes sir, pretty well.

9 Q. Do you know,—simply as a matter of history,—when the company became incorporated? Of course, that is matter of record.

A. That is a matter of record; some time in 1882.

10 Q. Did you become identified with it first in the early part of 1891?

A. Yes sir.

11 Q. When you became a stockholder and afterwards was elected a director?

A. Yes sir.

12 Q. Are you able to state, Mr. Stuart, at this time the nature and character and extent of the business done by the Covington Electric Light Company at and subsequent to the time that you became a stockholder and director in it?

A. Well, as I said before, the early part of 1891 they were doing considerable commercial business, I suppose probably aggregating from two to three thousand dollars a month, that it, their business; I could not be precise about it now, been so long ago.

13 Q. Just so it may be of record, will you just define the term as you use it,—"commercial lighting,"?

A. That is, furnishing electric current to stores, places of business, private houses, to all places of business and residences, other than public lighting.

146 14 Q. Did the company have anything to do with the lighting of the public highways, or bridges?

A. They had a contract to furnish light for the Chesapeake & Ohio bridge, is my recollection and they brought current across on that bridge to the Union depot.

15 Q. In Cincinnati?

A. In Cincinnati.

16 Q. How long did this contract exist, if you are able to state?

A. I could not tell you that.

17 Q. Could you tell when they commenced, or when they ended?

A. I could tell you that, in reference to the date.

18 Q. Was the Covington Electric Light Company engaged in 1891 in furnishing light under those contracts that you spoke of, the bridge, and the Union depot?

A. That is my recollection.

19 Q. Will you state, please, whether or not the Covington Electric Light Company had and maintained an electric lighting plant; and if so, where it was stationed, and its extent, character and nature?

A. They had an electric light plant on Madison street, Covington, between 4th and 5th, the same location that was afterwards used by the Suburban Electric Company; and they had, I would say, about three or four, perhaps five hundred H. P., capacity, and some,—I cannot remember just the number of arc machines and incandescent machines—but they had both, that is, were in shape to supply both kinds of light.

147 20 Q. Both arc and incandescent lights?

A. Yes sir.

21 Q. Will you please state the extent of the real estate that was owned and controlled by the company at that time?

A. The Covington Electric Light Company owned a lot on Madison street which I believe was 90 by 190, on which there was a frame building in which the Covington Electric Light Company changed part of it to a brick building, that is, the part that was occupied by the plant.

(Objected to by counsel for defendants as incompetent.)

22 Q. This real estate that you have described by metes and bounds, giving its location, was real estate that was used in the operation of the business of the company, was it?

A. Yes sir.

23 Q. And altogether used in that?

A. Yes sir.

24 Q. That is to say, no part of it was used for anything else?

A. Well, to be technically correct, there was an empty room there that was used for sometimes a little storage there.

25 Q. But some storage of material, or engines, or plants of the company, were they not?

A. Yes sir.

26 Q. All the rest was, however, as I understand you to say, used in the daily operation of the business of the company?

A. Yes sir.

148 27 Q. I will ask you to state, if you are able to, Mr. Stuart, to what extent, and if you can give us the number of poles that you owned and erected in the streets of Covington, in 1891?

A. Oh, I could not possibly give you the number of poles: we were furnishing light up Madison street and Scott street, and down Fourth street and on Pike street; and then we were furnishing current to Newport and to—well, they furnished both commercial and public lighting to Newport and Dayton.

28 Q. Did you do that by virtue of any contract that you had with those municipalities; or was it by virtue of contracts that you had with local companies?

A. It was by contract with local companies.

29 Q. And to what extent was the currect supplied under those contracts?

A. Oh, I think one contract amounted to about eight thousand dollars a year, something like that.

30 Q. Which one was that?

A. Newport.

31 Q. What about the other?

A. The other, I think, amounted to some thirty-five hundred or four thousand dollars.

32 Q. Did you own or control the poles and wires and appliances in the cities of Newport and Dayton?

A. No sir.

33 Q. What other territory, if you can recall, if there was any territory, that was being supplied by electric currect from your plant in 1891, when you first came to be identified with the company?

A. I don't call to mind any other territory.

149 34 Q You don't call to mind anything else in the vicinity of Covington?

A. No.

35 Q. Excepting the Union depot here in Cincinnati?

A. I mentioned that.

36 Q. I had asked you whether or not you could give us the number of poles that were erected in the streets of Covington in this year 1891 when you came into the company; can you recall the number of poles?

A. No, I cannot.

37 Q. Can you in any way give us the number of miles of wire that was stretched upon those poles—approximately?

A. Oh, I should suppose probably from twenty to twenty-five miles,—perhaps more.

38 Q. Where were these poles erected; in the streets or on private property?

A. In the streets.

39 Q. What was their location in the street?

A. Right along the edge of the curb, on the pavement.

40 Q. And the wires that you spoke of, the 25 or 30 miles of wire, were stretched upon these poles at those locations?

A. Yes sir. Those poles were about 150 to 400 feet apart.

41 Q. How generally was the city of Covington occupied by these poles and wires that you have spoken of?

A. Well, the center of the town was fairly well occupied.

42 Q. None of them were upon private property, that you would call such, they were all upon the public streets?

A. Yes sir, they were. There might be a pole on private property somewhere, but rather an exceptional case, to make a

150 short cut, or something.

43 Q. Did the business of the Covington Electric Light Company in furnishing electric current for commercial use increase during the years that we have mentioned, between 1891 and 1894?

A. Yes sir.

44 Q. If you can recall, I would be glad to have you state about

what amount of business of that character you were doing in 1894, say at the time of the consolidation of the companies into the Suburban Electric Company?

A. Well, I can only answer that question by rather vague recollection; but I think that it increased somewhere from 1891 to 1894, probably from $7500.00 to $10,000.00, somewhere in there, more in that time than it was in 1891.

45 Q. You mean per year?

A. Yes—no, I do not mean that it increased that much per year each year; but it increased that much during that time.

46 Q. So we may get it right—in 1894, do you mean to say it was $7500.00 to $10,000.00——

A. More per year then.

47 Q. Then it was in 1891, when you first became identified with the company?

A. Yes sir.

48 Q. Were you a stockholder and director in the Covington Electric Light Company at the time of the consolidation into the Suburban Electric Company in 1894?

A. Yes sir.

49 Q. Did you sustain any official relation to the Suburban Electric Company thereafter?

A. A director.

151 50 Q. Were you continuously in the board of directors of the Suburban Electric Company from the time of the consolidation in 1894 down to the formation of the Union Light, Heat & Power Company in 1900?

A. Well, I was either director or one of the officers of it.

51 Q. Will you please state whether or not from that time, *i. e.*, 1894, down to the first of 1900, when the Union Light, Heat & Power Company took over the property, franchises, etc., of the Covington Electric Light Co., that company, *i. e.*, the Suburban Electric Company, continued to do commercial lighting under the franchises and charter of the Covington Electric Light Company?

A. Yes sir.

52 Q. I will ask you—so as to get the matter clearly upon the record—whether or not, so far as you can recollect, you did any public lighting—and by that I mean lighting of the public streets, or yards, or public buildings, between 1891 and 1894?

A. We had lights on the streets, but not under contract with the city; they were paid for by contribution of the business men.

53 Q. But they served the public purposes?

A. Yes sir.

54 Q. The lighting of the public streets?

A. Yes sir.

55 Q. How about the public buildings; were any of them lit by contract with you, or with individuals for and on behalf of the company?

A. I think it was in 1893, or 1894, we were lighting the old court house and jail; I think we had some lights in there; but I could not say whether it was prior to 1894, or afterwards.

152 56 Q. Well, do you mean to say, about that time?
A. Yes sir.

57 Q. Can you state whether or not any effort was made between 1891 and 1894 to secure a contract with the city of Covington for public lighting?

A. Yes, there was a very strong effort made by a proposition from the Covington Electric Light Company to light the outlying districts that were then lighted by the gasoline lamps.

58 Q. What became of that effort on the part of the Covington Electric Light Company?

A. Well, the proposition was made to the council, and the gas company opposed it; and the matter got into the courts, and the effect of the decision was that the electric light company could go on and make a proposition to light; they did so, and it passed the lower house, that is, the council, and went to the board of aldermen, and there it failed by one vote to pass.

59 Q. Do you recall the time of that effort made on the part of this company to do public lighting?

A. Why, I think that was the latter part of 1891, or early in 1892.

60 Q. It was not long after you became identified with the company?

A. Not a great while.

61 Q. I will ask you to state whether, at the time of making this proposition soliciting the public lighting from the city boards of the city of Covington your company was equip-ed and prepared and enabled to render the service if the boards of the city had accepted the proposition?

A. Yes sir, the Covington Electric Light Company put in some large engines and large machinery at that time with that in view.

153 62 Q. Was the proposition refused or rejected because of any inefficiency in plant or in apparatus or in machinery of your company?

A. No sir.

63 Q. Do you know, Mr. Stuart, of any reason prompting the refusal of the boards to accept the proposition emanating from the lack of efficiency or apparatus or plant of the Covington Electric Light Company?

A. I have no recollection that anything—any objection of that kind was raised at the time.

64 Q. You may state, therefore, whether or not at that time your recollection or knowledge now is, that your plant was efficient, or otherwise, to discharge the service for which you were asking?

A. It was efficient.

65 Q. It was?

A. As I stated, it had put in a lot of machinery, new machinery for that purpose.

66 Q. Was that application presented again at any time before the Suburban Electric Company was organized; that is to say, was it renewed at any time subsequent to that, between 1891 and 1894?

A. No, I do not remember that there was. I could not say. Of course we were discussing a good deal at those times the possibility of getting some kind of a contract with the city: but the question that was before us all the time was the opposition on the part of the gas company; that was the main feature; there was not any question arose as to our ability to do it.

67 Q. You know, do you not, as a matter of fact, Mr. Stuart, that when the Suburban Electric Company was organized in 1894
154 by the consolidation of those three companies, that all the property, franchises, privileges, contracts, and everything belonging to the Covington Electric Company were in fact transferred to the Suburban Electric Company, and became its property?

A. Yes sir, I know that.

68 Q. Will you state whether or not the Suburban Electric Company continued after its organization to operate under the franchises of the Covington Electric Light Company in doing its commercial lighting, or rendering whatever electric service it did from that time on in the city of Covington?

A. In the city of Covington, yes sir.

69 Q. You did not operate in the city of Covington under any other franchise, did you, or any other right?

A. There was a change of name, that's all.

70 Q. That is what I mean. But there was no new right, no new franchise acquired or purchased under which you would operate, save and except this franchise belonging to the Covington Electric Light Company?

A. To operate in Covington,—yes sir.

71 Q. Can you state whether or not there was any public lighting done by the Suburban Electric Light Company under this franchise referred to between 1894 and May 1, 1901?

A. Yes sir, there was.

72 Q. When was it, and to what extent; just describe it fully?

A. They had a contract with the city of Covington to furnish lights for public lighting, Madison street and Pike street, in 1897 or 1898, I did remember which—'97, I think.

73 Q. Do you remember to what extent in point of number of lamps?

A. I think it was about thirty, or thirty-one, arc lights.

74 Q. And what extent of territory did those thirty-one
155 lamps, more or less, cover; how many blocks, or streets, or squares?

A. I think it went from Second street to Eighteenth street on Madison; and from Madison to Main street on Pike; and also the lighting of the court house and jail.

75 Q. Was there any incandescent street or public lighting done either upon the street or in the public buildings?

A. I say, incandescent light was used in the court house and jail; and I think there was a few incandescent lights in the corner of some alleys, something of that kind; I do not remember clearly about that.

76 Q. You think this was in 1897, or 1898, when you commenced?

A. Yes.

77 Q. Did that continue down to May 1st, 1901; and has it continued since?

A. I think it has occurred right along.

78 Q. Up to the present time?

A. I think so.

79 Q. Do you know as a matter of personal knowledge of the making out of bills for this lighting service, their presentation, and payment by the city?

A. Yes sir.

80 Q. How frequently were the bills rendered, and to whom; to what officer, or officers, and from whom was the payment received?

A. The bills were made out, rendered to the city clerk, and by him presented to council; and by the council allowed, and paid by the treasurer.

81 Q. You thus describe the *modus operandi* of presenting bills and receiving payment thereof?

A. Yes sir.

82 Q. And in that, did I understand you to say that the bills went through the two boards of the common council and
156 received their approval?

A. Why, I do not remember that the bills had to go before the board of aldermen. I presume they had to. Whatever question arose was generally the council. Well, if they did, the- passed both boards, if that was required, because the bills were paid according to their form.

83 Q. Do you recollect the form of contract for this public service: whether by ordinance, resolution, or otherwise?

A. I think it was by resolution the contract passed both boards.

84 Q. If you have not any personal knowledge of it, the records, of course, of the proceedings of the common council will show?

A. Yes sir.

85 Q. Have you any personal knowledge or recollection of a positive direction from the common council to light certain streets, or to change the location of poles, or defining a change in the method of stringing wires?

A. I remember that the contract, or ordinance, whichever it was, specified that these lights were to be erected, loacted, under the direction of the committee of council, and the city engineer, I think.

86 Q. Now, Mr. Stuart, did the Suburban Electric Company from May, 1894, on to the present time continue to render commercial service in the city of Covington and vicinity?

A. From 1894 on, yes sir.

87 Q. State whether or not that increased?

A. The business increased?

88 Q. Yes sir.

A. Yes sir.

89 Q. How valuable did this business become, in point of figures if you can give it, from your recollection?

157 A. Well, until it got into litigation it was able to pay $15,000.00 a *p*ear interest on its bonds out of its profits.

90 Q. The bonded indebtedness of the Suburban Electric Company being $250,000.00?

A. Yes, sir.

91 Q. State whether or not the Suburban Electric Company had added to its plant in point of machinery and equipments, appliances?

A. Yes, sir.

92 Q. To what extent?

A. Well it was double what it was in 1891, more than double.

93 Q. I have reference now in the question, to that part of it relating to the city of Covington, of course?

A. Oh, the increase of the business in Covington?

94 Q. Yes, from the operation of its business under this franchise of the Covington Electric Light Company?

A. Well, its business increased; but as the current furnished under those different contracts to the different cities, commercial, etc., all went into the books together, so much current, so much light, I could not tell the proportion of increase; but the business increased in Covington right along.

95 Q. You may state whether or not your lines were extended by the erection of poles and the stringing of wires in the city of Covington?

A. Yes, there was scarcely, I might say, a month from 1891 up to 1894, and from 1894 on up to 1901 that there was not extensions going on somewhere, and more lines being put in; sometimes small ones, sometimes larger.

96 Q. Could you give anything like an average that this increase maintained?

158 A. No, I could not; just Covington alone; for instance the time we only went up to 11th with our pole line, we went out to 15th, then out to 18th street on Madison St., and we would get customers on these various streets, Pike street, and Fourth street, and various streets, farther than our lines extended, and we would then put sometimes an additional pole to extend a line; but I could not possibly tell you just where that location was within those dates; it was going on all the time.

97 Q. That is the extensions were going on?

A. Extensions were going on all the time, the business increasing all the time.

98 Q. Commencing with the year 1891, when you first came into the company, what was the *modus operandi* that was pursued in the location and erection of poles and stringing of wires—I mean by that, what notice did the city have, what requirements did it make with reference to that work?

A. Well, as we looked at it, we were operating under a charter from the legislature of Kentucky, and we did not have as in other cases to go to the city and ask for permission to put up poles here and there; the only question that arose was between the property-holders.

99 Q. You did not have to make application to any city officer, or board, for permission——

A. Only in case of public lighting; then the committee of council and the engineer had the say as to where those poles might be located, and lines for that purpose.

100 Q. So we can distinguish it, I am trying to ascertain whether or not in locating your poles and stringing your wires for commercial lighting you had to make, or did in fact make any application to any city officer, or board before erecting such poles and stringing the wires?

Mr. HANLON: At what time?

159 Mr. OUTCALT: At any time from 1891 on.

A. Not in reference to commercial lighting.

101 Q. No. I will ask you to state whether or not you were ever impeded or stopped or obstructed by any official of the city of Covington, or any board, in the erection of poles and stringing of wires during the period that you have named, for commercial lighting?

A. Yes, we had people frequently threatening——

102 Q. I mean outside of individual property-owners. I asked whether or not any officer of the city protested against it, impeded or obstructed it, or refused to let you do it: that is the point I am trying to get at.

A. No sir, I have no recollection of any city officer ever preventing or trying to prevent us from putting up poles.

103 Q. I want to ask another question, going farther than that, was there anything except acquiescence upon the part of the city and its officer- and boards in the erection of your poles and stringing of your wires during the period I have named, the said poles and wires to be used for commercial lighting?

A. You mean any question as to our right to do it?

104 Q. That's it.

A. Never. Never any question.

105 Q. Now let us put that in another form. State whether during all of the time that you were connected with the Covington Electric Light Company in the manner you have stated, and with the Suburban Electric Company, the city of Covington or any of its officers ever made any objection to the erecting of poles and stringing of wires, or the furnishing of currect by either of the companies named?

A. No, I cannot call to mind any objection raised by the city, or any conflict with the city on that question during that

160 time.

106 Q. Do you remember whether these arc lights that were paid for by individuals and placed on the public streets, lighting the public thoroughfares, were so placed and paid for before, or after, you had made this effort to secure the public lighting through the boards of the city?

A. Afterwards.

107 Q. Do you remember, Mr. Stuart, that the Suburban Electric Company was adjudged a bankrupt on the 1st of December, 1899?

A. I could not fix the date.

108 Q. What we understand is the time. You remember that it was adjudged a bankrupt about that time. Your statements, Mr. Stuart, with reference to the property and machinery, apparatus, appliances and appurtenances of all kinds and descriptions, and the conduct of the business, applied to and cover the period, or the time when the Suburban Company was adjudged a bankrupt, and Mr. Shaw, the complainant in this case, was made trustee?

A. Let me understand your term "adjudged a bankrupt" does that mean when it filed its application in bankruptcy?

109 Q. Did the same condition prevail as to the time that it went into bankruptcy and Mr. Shaw, the complainant in this case, was made the trustee; in other words, I want to get you to state the situation that covered this same period as of the date when this bill was filed, Dec. 3rd., 1900?

A. As to their doing business and going along the same way—yes sir.

161 Cross examination by Mr. HANLON:

1 X Q. You became associated with the Covington Electric Company, as I understand it, in 1891?

A. Yes sir.

2 X Q. Who were the stockholders in that company at that time, if you know?

A. Henry Worthington, A. M. Worthington, George G. Hamilton, J. R. Coppin, myself. There may have been some others that I don't think of.

3 X Q. Do you know when the Covington Electric Light Company was organized to do business in the city of Covington, if they ever did organize?

A. No, I don't know when the first organization was.

4 X Q. Do you know when the organization of the Covington Electric Light Company was effected?

A. No sir.

5 X Q. You don't know, then, whether there was such a company as the Covington Electric Company prior to 1891, or not, do you?

A. Yes, I knew there was such a company; but I did not know anything about who were their stockholders and their organization.

6 X Q. You say you knew there was such a company prior to that time; how long prior to that time, if you know, was there such a company as the Covington Electric Light Company prior to 1891?

A. Oh, I could not say, for several years, because there was a little talk about it, what it was going to do, and opponents of ours, you know; but I had no connection with it, or did not know anything of the details about it.

162 7 X Q. Do you know who the original incorporators of the Covington Electric Light Company were under the act of the legislature, 1882, granting an exclusive franchise to

enter in on the streets of Covington to light the streets for twenty-five years?

A. I only remember two of them.

8 X Q. Who were they?

A. Mr. Hallam and Mr. Glore, I think.

9 X Q. Theodore Hallam?

A. Yes, T. F. Hallam and W. H. Glore.

Mr. OUTCALT: I do not want to interrupt your examination, but of course you want to get it right. We have it right here. This is the original act; here is W. Woodruff; Wm. B. Moore, Jr., W. H. Glore and their associates.

11 X Q. Where was the Covington Electric Light Company doing business in 1891 when you became associated with it?

A. On Madison street between 4th and 5th; I don't know what the number is.

12 X Q. Is that the building that was formerly known as the Covington skating rink?

A. Yes.

13 X Q. Do you know, or are you able to state when the Covington skating rink stopped doing business or transacting business at that place?

A. The Covington skating rink—no, I don't.

14 X Q. You do know or remember that the Covington skating rink did business in that building prior to 1891, do you not?

A. Yes sir.

15 X Q. You don't mean to say that the City of Covington never entered into the contract with the Covington Electric Light Company to light *to* streets with electric light, or the public buildings, do you, at any time?

A. No, I don't think there was any contract for public
163 lighting between the Covington Electric Lighting Company and the city.

16 X Q. Don't you know it to be a fact that the Covington Electric Light Company on or about June 30th, 1887, made application to the city council of Covington for the purpose of getting privilege from the city to enter into and upon the streets of the city for the purpose of furnishing electric light to the public?

A. That was before I was identified with the Covington Electric Light Company.

17 X Q. I was asking you if you know whether that application was made to the city council of Covington, or not?

A. I don't remember.

18 X Q. Did you ever know of a company in Covington, electric light company, by the name of the Thomson-Houston Electric Company?

A. In Covington?

19 X Q. Yes sir.

A. No sir.

20 X Q. Never heard of it?

A. No, not in Covington.

21 X Q. Well, at any other place?

A. One in Cincinnati.

22 X Q. Did they ever furnish electric light to the citizens of Covington, or to the city itself, that you know of, that company?

A. No sir.

23 X Q. Did you ever hear of such a company as the Citizens' Electric Light Company doing business in the city of Covington at any time?

A. No sir.

24 X Q. When did they do business in the city of Covington if you know?

164 A. I think along about 1888, 1889, 1890—along there.

25 X Q. Where was that plant located in Covington, if you know?

A. That was located on Madison street between 4th and 5th, at the aforementioned place.

26 X Q. Aforementioned place?

A. The place we have been talking about before.

27 X Q. Was it located at any other place in the city of Covington before locating in the old skating rink building, if you know?

A. No, I think not, the Citizen's Electric Light Company, I don't think it was.

28 X Q. Don't you know it to be a fact that that company was located at Pike near Main, and doing business in the city of Covington prior to 1890, some four or five years prior to that time?

A. No sir.

29 X Q. Do you know who was at the head of the Citizens Electric Light Company in Covington?

A. Mr. Coppin was president, I believe, and A. M. Worthington was secretary and treasurer.

30 X Q. Did they organize that company, or did they purchase it from other people, if you know?

A. Why, I think they organized it.

31 X Q. Isn't it a fact that the Citizens' Electric Light Company furnished light to the citizens of Covington before the Covington Electric Light Company did?

A. Yes sir.

32 X Q. Isn't it a fact that the Covington Electric Light Company frequently applied to the city council of Covington for permission to enter in and upon the streets of the city, to erect

165 their poles and wires and to furnish the city with electric light; and that permission was refused to said company for the reason that said company had never organized, had never elected any officers prior to 1890; that their petition to the city council was not verified by any officer of the company; and for the further reason, that the petition to transact said business was not accompanied by any bond as required by the general ordinances of the city?

A. I do not know.

33 X Q. From whom did the Covington Electric Light Company,

if you know, get possession of the old skating rink to transact its business?

A. The Covington Electric Light Company bought out the Citizens' Company.

34 X Q. When was that, do you know, about what time was that transfer made?

A. Well, it was along in 1890, or 1891, latter part of '90, or first of '91, somewhere along there.

35 X Q. That was at the time that the Covington Electric Light Company started to do business in the city of Covington, wasn't it, if you know?

A. Do I know whether it was the first time we tried to do business?

37 X Q. Yes, sir.

A. No, I don't.

38 X Q. Will you state if they were doing business prior to that time in the city of Covington, or not?

A. No, I have no recollection of their furnishing light.

38 X Q. Are you a stockholder now in the Union Light, Heat & Power Company?

A. No sir.

39 X Q. Are you able to state when the first electric arc light appeared in the streets of the city of Covington?

166 A. Well, the incandescent light was there a considerable time before the arc light.

40 X Q. I mean the first electric arc light that appeared in the streets of the city of Covington?

A. No, I would have to make a guess out of that. The nearest I could get to it would be somewhere about 1885, or '86.

41 X Q. You are sure of that, are you?

A. No, I am not.

42 X Q. You are not able to say what company was it that furnished that light at that time, are you?

A. No, I could not tell you that.

43 X Q. Do you know at what time, or about what time, the first electric light was furnished to private consumers and citizens of Covington, and by whom, if you know?

A. It seems to me that the first electric light that was furnished was furnished by a man named Myers along about somewhere between 1884 and 1887, as close as I can get to it.

44 X Q. That was John Myers?

A. I don't remember what his first name was.

45 X Q. With what company was he associated at that time, if you know?

A. Kenton Electric Company, I think.

46 X Q. Where was that company located, if you know?

A. That was up on Pike street near Main, I think.

47 X Q. Isn't it a fact now that the first arc light the first electric arc light that appeared in the streets of the city of Covington was made by contract between the city and the Suburban Electric Light Company during the year 1894. or subsequent to that time?

A. Under contract with the city?

167 48 X Q. Yes sir.

A. I think it was. That applies two ways: in one sense you can read it there so as that would be the first arc light that appeared in the city of Covington; that is not the sense in which I answered it: I answered it that that was the first contract. There was arc light on the streets before that.

49 X Q. You say there were arc lights on the street prior to that: who furnished these arc lights prior to this time?

A. They were paid for by private contribution of business men.

50 X Q. No, my question is, what company furnished the lights prior to this time?

A. The Covington Electric Light Company furnished them.

51 X Q. Do you mean to say that the Covington Electric Light Company furnished arc light for the streets in the city of Covington prior to 1894?

A. I mean to say they had arc lights upon the streets prior to that time.

52 X Q. Were they furnished to the city, or to private party?

A. They were paid for by private contribution of the business men.

53 X Q. They were paid for by private contribution, you say. I understand you to mean by this, that these arc lights were used in front of the business houses and in the city for private purposes; is that your meaning?

A. No, they were put up for the purpose of lighting the streets in certain localities.

168 54 X Q. Were those lights in the street proper, or were they erected in front of business houses along the side-walks of the city?

A. They were suspended across the street.

55 X Q. You say those lights were paid for by private subscription?

A. Yes, sir.

56 X Q. Where were those lights located?

A. Located on Madison street between Sixth and Pike, and up to the corner of Seventh and Madison; and on Pike between Madison and Washington.

57 X Q. Do you know who these parties were that you spoke of that subscribed for the payment of those lamps in the street?

A. No, I could not name them all; I could name some of them.

58 X Q. Just name those that you can.

A. Mr. Hickey—Mr. Degginger—Mr. Kueven and Mr. Motch and so on up and down the street.

59 X Q. These lights were furnished subsequent to the time that you became associated with the Covington Electric Light Company, were they not, in 1891?

A. Yes.

60 X Q. State if you know, why no contract was ever entered into between the city of Covington and the Covington Electric Light Company during the time that you were associated with it?

A. Principally on account of the opposition of the gas company.

61 X Q. Wasn't it principally on account of the fact that you did not give the bond required, twenty thousand dollars, required by the city under ordinance?

A. No, sir.

169 62 X Q. Did the Covington Electric Light Company during the time that you were associated with it, ever make application that you know of to the city council of Covington to do business in the city of Covington?

A. No sir, I have no recollection of ever making any such application.

63 X Q. Did you, or the officers of the Covington Electric Light Company from the time you became associated with it in 1890 not know that there was a general ordinance of the city of Covington passed some time in 1883, or 1884, requiring all electric light companies desiring to do business in the city of Covington to first make application to the city council for permission to enter in and upon the streets of the city and erect poles and wires, and to accompany said application by a bond in the sum of twenty thousand dollars, as a guarantee to replace the streets in proper condition?

A. I was not managing actively the affairs of the Covington Electric Light Company at that time. I knew of such an ordinance, but presumed that it was not operative in our case, as we had the right to go upon the streets by reason of our legislative charter. I think that was the view we took of it.

And further deponent saith not.

(Signature waived by consent and agreement of parties by their counsel, as heretofore set out above.)

170 By agreement of parties, the taking of testimony in the above entitled cause was continued under the stipulation heretofore set out, at the office of Ernst & Cassatt, on the 5th day of December 1901.

Present on behalf of the complainant, Mr. Charles E. Prior and Mr. A. C. Cassatt; and on behalf of the respondents Mr. Francis J. Hanlon.

By agreement of counsel the complainant offered in evidence the following copies, all of which was agreed should be attached hereto, marked as hereinafter indicated, and that said copies so attached hereto should be used as evidence in the trial of this case, the same as if the originals had been introduced, subject to exceptions for incompetency and irrelevancy only, all exceptions to the form of introduction being waived. Said copies are as follows:—

1. Copy of an act of the General Assembly of the State of Kentucky, incorporating the Covington Electric Light Company, passed April 22, 1882; marked "Complainant's Exhibit "A."

2. Copy of an act of the General Assembly of the State of Kentucky, amending the act incorporating the Covington Electric Light Company, dated May 5, 1884. Marked "Complainant's Exhibit B."

3. Copy of the agreement of consolidation of the Covington Elec-

tric Light Company of Covington, Ky., the Suburban Electric Illuminating, Heating & Power Company of Newport, Ky., and the Citizens' Electric Company of Dayton, Ky., into the Suburban Electric Company, dated April 11, 1894, which articles of consolidation it is stipulated were duly filed and recorded according to law.

171 Marked "Complainant's Exhibit C."

4. Copy of agreement between the Suburban Electric Company and the city of Covington, dated December 27th, 1897, together with bond to secure the performance of the same, which it is stipulated was accepted and approved by the board of councilmen December 27th, 1897, and by the board of aldermen, December 27th, 1897, and approved by the mayor the 28th day of December, 1897; marked "Complainant's Exhibit D."

5. Copy of the resolution of the council of the city of Covington, entitled "council resolution 419," calling for an opinion from the city solicitor and the law committee as to the rights of the Suburban Electric Company: marked "Complainant's Exhibit E."

6. Certified copy of the minutes of the council of the city of Covington, December 27th, 1897, containing the report of the city solicitor and the committee of council relative to the right and powers of the Suburban Electric Company, and the statement of the action of council thereon. Marked "Complainant's Exhibit F."

7. Copy of contract between the city of Covington and the Suburban Electric Company, dated April 24, 1899, with bond attached, which contract it is stipulated was accepted by the board of councilmen April 24, 1899, by the board of aldermen April 27, 1899, and approved by the mayor on June 5, 1899; marked "Complainant's Exhibit G."

172 8. Copy of an ordinance of the city of Covington, passed and approved October 5, 1882, to enable the Covington Electric Light Company to exercise the franchise granted by the act of the General Assembly of Kentucky. And it is stipulated that said ordinance is the ordinance that was repealed by an ordinance of the city of Covington, passed and approved June 21, 1883, introduced in evidence by the defendants herein. Marked "Complainant's Exhibit H."

And the respondents offer, subject to the above stipulation herein, the following copies of the proceedings of the general council of the city of Covington, it being agreed between the parties that the same may be read as evidence on the trial of this cause, subject to exceptions for incompetency and irrelevancy.

1. Certified copy of an ordinance prescribing the terms upon which streets, alleys, avenues and public grounds of the city of Covington, Ky., may be used by incorporated companies, firms or individuals engaged in the business of furnishing light by means of electricity; referred to in the answer of respondents, and marked "Respondents' Exhibit A," said ordinance having been passed by the city council of Covington June 21st., 1883.

2. Certified copy of "An ordinance to amend an ordinance passed June 21st., 1883, entitled "An ordinance prescribing the terms upon which streets, alleys, avenues and public grounds of the city of Cov-

ington, Ky., may be used by incorporated companies, firms or individuals engaged in the business of furnishing light by electricity;" said amended ordinance being referred to in the answer of the respondents herein, and referred to in said answer as "Respondents' Exhibit B," said amended ordinance having been passed by the city council of Covington, Ky., on July 3rd., 1884.

CINCINNATI, OHIO, *December 5th*, 1901.

The further taking of these depositions was resumed at 3.00 p. m., this date, according to agreement, same counsel being present.

Thereupon CHARLES H. SHAW, called on behalf of complainant, being first duly sworn, testified as follows, to-wit:—

Direct examination.

By Mr. CASSATT:

1 Q. Mr. Shaw, are you the Charles H. Shaw whose names appears as trustee of the Suburban Electric Company, trustee in bankruptcy of the Suburban Electric Company, a complainant in this case?

A. I am.

2 Q. Will you please state what connection, if any, you had with the Suburban Electric Company, commencing at the time that you first became connected with the company down to the present?

A. I believe it was in the spring of 1897 that I was elected secretary and treasurer of the Suburban Electric Company. I served as such officer through the years 1898 and 1899, and the company went into bankruptcy December, 1899, and I was elected trustee in bankruptcy. I conducted the plant as such office- until the close of the bankruptcy proceedings some time in January of February of 1901. I remained, however, secretary and treasurer of the corporation until April 1901.

3 Q. Until what event?

A. Until the Suburban Electric Company was discharged in bankruptcy, and the plant was turned back to the stockholders, and a stockholders' meeting was held after possession of the plant was given over to the stockholders.

4 Q. Were you during all this period a director of the company?

A. I was, and a stockholder, and up to January or February, 1901, was a bondholder.

5 Q. When you first became connected with the Suburban Electric Company, in what business was it *ne*gaged in the city of Covington?

A. It was engaged in the city of Covington in the business of generating, selling and distributing electricity for the purpose of light, heat and power.

6 Q. For the purpose of light, heat and power?

A. Yes. Its distribution was made by means of wires extending over the city, and poles erected on the streets in the city, and the

company was generally doing a commercial electric heat, light and power business.

7 Q. Did your company own its plant in the city of Covington?

A. It did.

8 Q. How extensive was that plant?

A. I don't remember the exact equipment, but it was a very large plant. There were four or five very large boilers and a number of incendescent and arc machines, together with the necessary machinery equipment to produce the product and supply the custom. We had some nine or ten thousand incandescent lights—between eight and ten thousand incandescent lights.

9 Q. In the city of Covington?

A. Not all in the city of Covington, no; and we had a number of arc lights. The product of the plant was used in Newport, Dayton, Bellevue and Covington, Ky.

176 10 Q. Are you able to state about how mane arc and incandescent lamps, seperately stated, were supplied by your company with the city of Covington?

A. I don't remember exactly, but to the best of my recollection, about half of the incandescent lights were those in use in Covington, and about one-fourth of the arc lights used for commercial purposes at the time I was elected. secretary and treasurer.

11 Q. When did you first commence to furnish electric light for the streets and public buildings of the city of Covington by contract with the city of Covington?

A. The contract with the city of Covington, to the best of my recollection, was closed to take effect about the 1st, of April, 1898. Negotiations leading up to such a contract had been in existence for several months prior to that.

12 Q. I show you a copy of a contract which is in evidence in this case, marked "Complainant's Exhibit D," in order to refresh your recollection with reference to the date of that contract. (Producing to witness.)

A. As stated before, negotiations leading up to a contract with the city of Covington were pending for several months prior to the closing of the contract, and the contract was finally delivered on the 27th day of December, 1897. I was in error when stating it was in April, 1898. While the contract was actually executed on the 27th day of December, 1897, the furnishing of currect under the terms thereof did not actually begin until some time about the 1st of April, 1898. It took a month or two to wire the court house and jail and erect the arc lights on the streets, under the terms of the contract.

13 Q. Is the paper which I have handed you, and which is in evidence in this case, marked "Complainant's Exhibit D," being the contract of December 27th, 1897, a copy of the contract which was entered into between your company and the city of Covington?

177 A. After reading the exhibit, it appears to me to be a copy of the contract entered into the 27th of December, 1897, and it also bears the certificates of the city clerk as being an absolutely cor-

rect copy, and substantially contains the conditions of the contract as I recollect it.

14 Q. Did your company do the work in accordance with the specifications attached to said contract?

A. It did.

15 Q. Who conducted the negotiations with the city of Covington leading up to this contract?

A. Mr. Archie Stuart, president of the company at that time, and myself. I took quite an active part in it.

16 Q. Did you have occasion in conducting these negotiations to deal with the general council of the city of Covington, and with any of the officers of the city of Covington on behalf of your company?

A. I did.

17 Q. Please state whether or not the city of Covington, through its general council, or through any of its officers, denied or questioned the right of your company to occupy the streets of the city of Covington and to erect poles and string wires necessary to fulfill its contract, or for purposes of commercial lighting?

(Objected to by counsel for respondents as leading and incompetent.)

A. I can best answer this question by giving a brief statement of some of the occurrences preceeding the contract entered into with the city, of date December 27th, 1897. Up to that time, no question had been raised, during my connection with the company, as to the right of the company to do commercial lighting in the city of Covington and occupy the streets for the purpose of erecting poles and stringing wires, so long as the same was done under such regulations as
178 the city might prescribe, until the city offered for sale the right which it had, under an ordinance dated 1852 to purchase what was known as the Covington Gas Light Company. When this right to purchase the Covington Gas Light Company was offered for sale under sealed bids, the Suburban Electric Company, acting through Mr. Stuart as its president, and myself as its secretary and treasurer, made a bid for this right to purchase the Covington Gas Light Company. The substance of our bid was, that we would light Madison avenue and Pike street with thirty-four or thirty-five arc lights for one year free of charge; that we would wire the court house and jail according to specifications set forth in the contract of December 27th, 1897, and furnish the current to light said buildings for one year, free of charge. Our bid—that is the bid of the Suburban Electric Company—for this right to purchase the Covington Gas Light Company was accepted. Prior to entering into the contract of December 27, 1897, the question in the general council as to whether or not we had authority to light the streets of Covington, was raised and discussed; not as to our right to enter the streets, however, but more particularly as to our right to light Madison avenue and Pike street when the Covington Gas Light Company had a contract in existence at that time to light said thoroughfares with gas.

Thereupon the general council of the city of Covington, as I recol-

lect it, appointed a committee, or had its ways and means committee, or its light committee, together with the city solicitor, Mr. William McD. Shaw, to investigate the rights of the Suburban Electric Company in the city of Covington to enter upon the streets for the purpose of furnishing street lighting. I had a number of interviews with the city solicitor, and I believe with the ways and means
179 committee: and the committee appointed by the general council made a report, the details of which I do not recall; but in substance it was, that after investigating the subject it was the opinion of that committee and the city solicitor that the Suburban Electric Company had the right to enter the streets of Covington for purposes of furnishing street lighting by means of arc lamps. The records of the city of Covington should show what report they made.

18 Q. I hand you a paper in evidence in this case, being the certified copy of the proceedings of the board of councilmen of the city of Covington, of December 27, 1897, and ask you to state whether or not the report which that contains is the report to which you refer? (Producing to witness.)

A. (After examining.) The report you have handed me is the report returned by the light committee and the city solicitor on the question spoken of in my previous answer.

19 Q. And that is the report to which you referred in your previous answer?

A. It is. The city council insisted upon having this report before entering into contractual relation with the Suburban Electric Company to do the lighting in its public buildings and on its streets; but prior to that the company had been doing commercial light for several years.

20 Q. Was your company advised through you, at the time of entering into the contract of December 27, 1897, of the existence of this report and opinion of the city solicitor?

A. The company was advised through Mr. Stuart and myself,—I don't recall whether at a stockholders' meeting or otherwise—but we as an executive committee, having been theretofore empowered and authorized to act for the stockholders in such matters, communicated the substance of that report to the directors of the company and through them to many of the stockholders. In
180 fact the contract of December 27, 1897, was not entered into until after the report you have shown me was made to the city council of the city of Covington and approved by it.

21 Q. Will you please state whether or not your company incurred expense, and if so to what extent, in carrying out the contract of December 27, 1897, made after this report of the city solicitor and committee to council?

A. In carrying out the terms of the contract of December 27, 1897, our company spent between $60000.00 and $7000.00 in wiring the city hall, court house and jail, and erecting arc lights on Madison avenue and Pike street, and furnishing the currect to keep said lights burning under the specifications contained in the contract, for a period of one year from the time the lighting began.

22 Q. When, Mr. Shaw, did your company next enter into a

contract with the city of Covington, if at all, for the furnishing of light to the city and in its public buildings, and upon its streets?

A. As stated by me, while the first contract was dated December 27, 1897, the wiring of the public buildings and Madison avenue and Pike street took several months before it was completed. The lighting of the same and the furnishing of currect, as I recall, began about April 1, 1898, and under the contract of December 27, 1897, the Suburban Electric Company was to keep the lights burning, as per the schedule, for one year from the time the lights were put in operation. During the month of April, 1899, the lights were kept burning by the Suburban Electric Company pending negotiations with the city of Covington for a renewal of the contract of December 27, 1897, on a payment basis for one year, and during the month of April a new contract was entered into with the city of
181 Covington to continue the lighting the public buildings, Madison avenue and Pike street for one year, from the 1st of April, 1899.

23 Q. I hand you copy of contract, dated the 24th day of April, 1899, which is in evidence in this case, marked "Complainant's Exhibit G," and ask you if that is the copy of the contract to which you refer? (Producing to witness.)

A. It is.

24 Q. At the termination of the period provided for in the last mentioned contract, will you state whether or not the Suburban Electric Company entered into any new contract with the city of Covington, or what was done with reference to lighting the city.?

A. Before the expiration of the contract of April 24, 1899, the Suburban Electric Company was thrown into bankruptcy at the instance of three creditors of said company; the application to have it adjudged a bankrupt was made during the month of November, 1899, and the company was adjudged a bankrupt some time in December, 1899. About the 27th of December, 1899, I was elected trustee in bankruptcy and authorized by the bankrupt court to continue the business of the company. I continued, under the contract of April 24, 1899, to light Madison avenue and Pike street and the public buildings, and was paid for so doing by the city of Covington. After April 1, 1900—which was the date on which the contract I am speaking of expired—negotiations were had between myself and the city of Covington looking to a renewal of said contract, but as I could not make a contract for a period of one year under the terms of the bankrupt act, I entered into a new contract with the city of Covington, which was substantially that I
182 should continue the lighting as before at the terms of the old contract; but the city of Covington was to have the right, and I was to have the same right, to terminate the contract at the end of any month. This is my best recollection of the last contract.

25 Q. What was done thereafter under the matter of this arrangement?

A. I continued to furnish light to the city of Covington from month to month at the prices and figures mentioned in the contract of April 24, 1899, until the termination of my trust, some time in

January or February of 1901, receiving pay from the city of Covington for the services performed and lights furnished.

26 Q. This continued, as I understand, until your connection with the business of that company was settled?

A. Settled, yes sir.

27 Q. Will you please state whether or not during the entire period which you have just defined, within which you furnished light to the city of Covington, the said city of Covington paid the bills as per the contract or contracts mentioned by you?

A. The city of Covington continued to pay its bills under the terms of said contracts, as per bills rendered, until some time during the middle of the year 1900, when the bills rendered against the city were not allowed because the Suburban Electric Company, under the claims of the city, was in arrears for city taxes; and in September, I believe it was of 1900, the City of Covington, through its city solicitor, filed a claim against the Suburban Electric Company for back taxes, and the amount due the Suburban Electric Company was off-set against the claim of the city, and the balance paid to the city of Covington in settlement of taxes. I mention this, simply, that part of the bills were not paid at that time be-
183 cause of the reason mentioned.

28 Q. There were no other reasons assigned?

A. Three months bills rendered against the city were in dispute, the light committee contending that they were too high, and I, as trustee in bankruptcy, contending they were just and equitable. This matter was compromised, however, during my trust, I believe.

29 Q. Referring to the question of taxation, will you please state what amount, if any, was assessed against the Suburban Electric Company during the time you were connected with it in the capacity stated, on account of franchise taxes due to the city of Covington, and what was done with reference to such assessments?

A. I could not state the amount of taxes rendered against the Suburban Electric Company for taxes, either franchise taxes or property taxes, without refreshing my memory with the books, but there were taxes of all kinds rendered against the company, and I feel sure no possible tax was overlooked. While I was secretary and treasurer of the company, and prior to its bankruptcy troubles, some taxes were paid by the company at Frankfort, and some were paid to the city officials of Covington. Some were not paid because the company was in financial distress and the bills filed in bankruptcy by the city solicitor of Covington, during the year 1900, covered back taxes, I believe, due the city as far back as 1895. This claim was made under some ruling or decision in Kentucky permitting retroa-tive assessment of taxes where taxes were omitted.

30 Q. The back taxes to which you have just referred, are the taxes which in your former answer you said were settled by compromise?

184 A. Yes, sir. The proceedings in bankruptcy will show the affidavit of the city, also the figures on which the settlement was based.

31 Q. I show you a memorandum (producing to witness) for pur-

pose of refreshing your recollection, and ask you to state whether or not in that compromise the Suburban Electric Company paid any amount for franchise taxes, and if so, what amount and for what years.

(Objected to by counsel for respondents as incompetent and irrelevant.)

A. At the time, and prior to the compromise of taxes both on real estate, poles and wires, and franchise from the year 1895 up to 1898, the city had accepted from other institutions fifty cents on the dollar in settlement. I appeared before the ways and means committee of the city of Covington, and then before the committee of the whole of the city of Covington, for the purpose of effecting this settlement on a similar basis. The settlement was finally agreed to, which settlement covered back taxes on real estate, poles and wires, for the years 1899 and 1900, and franchise tax for the year 1895, 1896, 1897 and 1898 on the basis of fifty cents on the dollar; and franchise taxes for the year 1900 in full as rendered by the city.

32 Q. What was the amount so paid—the aggregate amount so paid for franchise *y*axes, to the city of Covington?

A. Some $1800.00—I don't remember exactly—in settlement of franchise taxes from 1895 to 1900, both inclusive. In addition to this the Suburban Electrci Company, as I recall it, paid its State tax for franchise. This was paid at Frankfort. I also appeared before the State board at Frankfort in an effort to have the basis of taxes for franchise reduced.

185 33 Q. Did the city and the Suburban Electric Company pay the respective amounts which they agreed to pay in this compromise and settlement, to which you have referred?

A. They did.

34 Q. Mr. Shaw, from the time you first became connected with the Suburban Electric Company, were you familiar with its various operations in the city of Covington, its extensions, if any, additions to its plant, if any, and matters of like character?

A. I was.

35 Q. Will you please state what, if any, extensions or additions were made to the plant and lights of your company in the city of Covington, during the period from your first connection with the company up until the time when you ceased to act for it, as you have stated?

A. Thousands of dollars were spent in extensions, betterments and repairs,—the exact amount I could not state now,—but we were constantly installing lights in houses, commercial arc lights in front of business places and in the stores. We also extended our wires out in the neighborhood of Lewisburg, and one night erected wires on the telephone poles in one of the villages adjoining the city of Covington, but we were compelled to take them down as we did not have our own poles to string them. In our generating plant a large amount of money was expended for betterments of every kind in an endeavor to furni*hs* the people an up-to-date light.

36 Q. Were these extensions of lines to which you have referred, made upon the streets of Covington, or over private right of way?

A. They were made in the streets of Covington, and some
186 were put up at the instance of the officials of the city, poles erected and wires strung, in order to give them more efficient light in their neighborhood and wards. We felt we wanted to accommodate the city as much as possible.

37 Q. During the time of your connection with the company, was any objection made officially by the city of Covington, or any of its officers, to your operating and maintaining an electric light system in the city of Covington, and extending the same, by reason of any defect in your powers under the franchise which you had acquired from the Covington Electric Company?

A. None whatever. Once in a while, if a pole was not properly set, our attention would be called to it and the defect would be remedied.

38 Q. Please state in a general way, what action, if any, the city or any of its officers took with reference to the location of your poles or wires?

A. They took no interest in the location of our poles and wires except occasionally when they desired one of the 35 arc lights moved from one point to another under the terms of the contract existing between the city of Covington and the Suburban Electric Company. On one or two occasions the request was made that we move our arc light from one corner to another corner, in order to give the neighborhood a more diffused light; but no supervision was ever actively exercised over our poles and wires during my connection with the company by any of the city officials.

187 39 Q. Mr. Shaw, did you make any conveyance as trustee — bankruptcy, by virtue of which the property in your hands as trustee was turned back to the Suburban Electric Company?

A. I believe I did. I was required, under the court's order, *o*t transfer to the stockholders and to the corporate body, the physical property and franchises of the body and close my trust. I did this under the terms of the court's order. I believe a conveyance was executed at that time.

40 Q. Mr. Shaw, I will ask you to state whether or not when you became trustee in bankruptcy, such proceedings were taken as to vest in you all the property, including the franchises of the Suburban Electric Company?

A. That might call for a little conclusion, but as I understood it, as the bankrupt act states, the trustee in bankruptcy takes all the rights that belong to the individual who is adjudged a bankrupt, whether a company or individual, and I assumed the control of them while I was operating as trustee in bankruptcy.

41 Q. Did you turn back to the Suburban Electric Company at the close of your service as trustee, all of the franchises which were vested in you as such trustee?

A. I did, together with all the physical properties and assets belonging to the company.

Cross examination:

By Mr. HANLON:

1 X Q. Mr. Shaw, when was the Suburban Electric Company incorporated?

A. The Suburban Electric Company was incorporated before I had any connection with it; I don't recall the date.

188 2 X Q. When did you become associated with the Suburban Electric Company?

A. My first acquaintance was with the Suburban Electric Company—I understood the Suburban was a consolidation of three constituent companies, I don't just recall their names. My connection began along in the spring of 1897.

3 X Q. The Covington Electric was one of those constituent companies that you have mentioned, wasn't it?

A. I believe so, I don't know whether that was its technical name or not. It was a company operating in the same field as the Suburban.

4 X Q. Your testimony which you have given in chief, relates to transactions and contracts between the Suburban Electric Company and the city of Covington, does it not?

A. Yes.

5 X Q. Entirely?

A. Yes.

6 X Q. Did you ever hear or know of the Kentucky Electric Company?

A. Yes, I have an indistinct recollection of a company called the Kentucky Electric.

7 X Q. Where was that company doing business?

A. I don't know; I never had any connection with it.

8 X Q. Well don't you know it to be a fact that it was doing business in Ludlow——

A. Oh, the Kentucky Electric! Yes, it was doing business in Ludlow, Kentucky, with Mr. Fleming as the president. It sought to get into the city of Covington with its wires.

9 X Q. Isn't it a fact that a few years ago the Kentucky
189 Electric Company endeavored to procure a contract with the city of Covington, for the purpose of furnishing electric light to the city of Covington, and for use of the public streets, highways, and public buildings, and that the Suburban Electric Company, of which you were an officer, went into the United States court and enjoined the city of Covington from entering into such a contract with the Kentucky Electric Company?

A. I did that, as trustee, I believe. I instituted injunction proceedings before the Honorable Walter Evans,—and I might say here that the injunction was granted.

10 X Q. It has been the aim of the Suburban Electric Company, has it not, to keep out competing companies from the city of Covington, or from furnishing electric light to the city of Covington, and to hold the exclusive right to furnish electric light itself?

A. I have always considered that the Suburban Electric Company

had the exclusive franchise there, and I used my best efforts to keep that from impairment, and to allow competing companies to come in would be an impairment of that franchise, in my judgement.

11 X Q. Why do you claim that the Suburban Electric Company has an exclusive franchise to furnish electric light to the city of Covington?

A. Well, the electric lighting of Covington by the Suburban Electric Company, as I understood it—I only had it from hearsay—went back to a legislative grant from the legislature of the Commonwealth of Kentucky to an association, or association of individuals, and as a matter of general history, I believe the Suburban
190 Electric Company was the ultimate outgrowth of that. That, coupled with its contracts and the long acquiescence of the city to the use of its streets, and again after the investigation of its city solicitor supporting our right to the use of the streets, led me to believe, as a lawyer, that our rights were exclusive; and it had never been contended otherwise until the endeavor of the Kentucky Electric to come in there.

12 X Q. You speak of a contract, and the long acquiescence on the part of the city; to what company do you refer?

A. I referred to the Suburban Electric Company; and also permitted one of the constituent companies, which entered into and formed part of the Suburban, to do a similar service and prior to the organization of the Suburban Electric Company.

13 X Q. This conctituent company you refer to is the Covington Electric Light Company?

A. I believe that is its name, I don't recall its exact title.

14 X Q. You don't mean to say, or will not say that the city of Covington never entered into a contract with the Covington Light Company to light its streets?

A. No, I don't say that; but I do say that the records of our company—that is the Suburban Electric Company—showed that the Covington Electric Company had been using the streets for lighting purposes long prior to the consolidation of the three companies, and that the franchises and rights by the consolidation passed into the Suburban Electric Company.

15 X Q. When you say the Covington Electric had been using the streets long prior to the consolidation, what do you mean by "long prior?" How long before that?

191 A. Well, I understand they had been doing it for a number of years before that. I suppose perhaps six or seven years; I don't know. I used "long prior" the same way you used a "few years ago" in your inquiry.

16 X Q. You don't know how long before the Covington Electric was using the streets of the city of Covington, do you?

A. No, not definitely, except as I have answered.

17 X Q. Don't you know it to be a fact that permission was asked by the Covington Electric Light Company of the city of Covington about the year 1887 or 1888, for the privilege of entering upon the streets of the city of Covington to erect poles and string wires for

the purpose of furnishing electric light to the city of Covington, and that permission was refused said company to do business in the city?

A. I don't know that *of* be a fact, and don't know it not to be a fact; but I apprehended that if the refusal was made it was made on the same basis that the question was mooted when we attempted to light *to* city—that is, because Mr. Shinkle had a contract to light the city by gas.

18 X Q. Then you don't know whether or not that was asked, or refused by the city?

A. No, and if it was refused, on what grounds it was refused.

19 X Q. To whom did the Suburban Electric Company sell out?

A. I don't know anything about that.

20 X Q. Who lifted the Suburban out of bankruptcy?

A. The stockholders.

21 X Q. Of the Suburban?

A. Yes sir.

22 X Q. Don't you know that the North American Light Company purchased the interest of the stockholders in the Suburban, and they sold out to that company after the proceedings in bankruptcy?

192

A. No, I do not know that. In fact I had no connection of any kind with the North American Light Company.

23 X Q. Are you a stockholder in the Union Light, Heat and Power Company?

A. Of record, no.

24 X Q. Of record or otherwise?

A. Well, I can hardly answer that question. I loaned some money on some of the stock. Whether I have to take it or not, I don't know. I might have to take it, and might not.

25 X Q. You say you have loaned some money on the stock of the Union Light, Heat & Power Company?

A. On what is known as the Union Light, Heat & Power Company, yes.

26 X Q. Did you take that stock as security for stock you had?

A. Yes sir.

27 X Q. Is it in your possession?

A. No.

28 X Q. It is under your control, is it?

A. Yes.

29 X Q. Then you are interested to some extent in the Union Light, Heat and Power Company's welfare in the city of Covington, and in its endeavor to maintain this alleged exclusive franchise, which it claims to have, to light the streets of Covington, are you not?

193

A. Yes.

30 X Q. Don't you know it to be a fact that pending this suit in the United States court, that the Union Light, Heat & Power Company has made a proposition to the city of Covington, to light the streets of the city of Covington with electric lights, and furnish electric light to the city for use in its public buildings for a period of

six or seven years, and that in the event of the city of Covington entering into this contract with the Union Light, Heat & Power Company, one of the conditions of the contract was to be that this suit now pending in the United States court was to stand dismissed, no further steps being taken by the city in defense of that litigation?

A. I know nothing about the subjects mentioned in the question you ask, and have no knowledge of the workings or plans of the Union Light, Heat & Power Company. I might say that they do not consult me as to what they do or what it expects to do.

31 X Q. During your connection with the Suburban Electric Company, did that company ever execute a bond to the city in the sum of $20,000 to secure the city and indemnify the city against any loss by reason of having to repair the streets, by reason of the Suburban Electric Company being permitted to enter upon the streets of the city of Covington to erect its poles; was that bond ever given by the Suburban Electric Company?

A. I couldn't say. No such bond was executed while I was connected with the company as secretary and treasurer or as trustee, and was never asked while I was an officer of the company. There was a $5,000.00 bond during my term as trustee in bankruptcy, but that was to hold the city harmless from the gas company by reason of the lighting of Madison avenue and Pike street by electric light.

194 32 X Q. Don't you know it to be a fact that there was an ordinance of the city of Covington in 1883 and 1884, requiring all electric light companies doing business in the city of Covington, to execute a bond in the sum of $20,000?

A. I heard something to that effect, but never saw the ordinance, and I believe never saw a copy of it. The bond, as I said, was never asked of the Suburban Electric Company while I was an officer of it.

33 X Q. Do you know who bought out the Kentucky Electric Company?

A. I do not.

34 X Q. Do you know why the proceedings against the Kentucky Electric in the United States court were dismissed?

A. I do not, unless their counsel thought he could not win the case. I had no talk with him about that.

35 X Q. Isn't it a fact that the company sold out to the North American Light Company?

A. I could not say. I had nothing to do with that.

36 X Q. Isn't it a fact that the North American Light Company subsequently sold out to the Union Light, Heat & Power Company?

A. I know nothing of that; I never heard of the North American Light Company in these transactions.

195 Redirect examination.

By Mr. CASSATT:

1 R. D. Q. Mr. Shaw, you said you were a bondholder of the Suburban Electric Company?

A. Yes, I was.

2 R. D. Q. Are you familiar with the terms of the mortgage for $250,000.00 securing the bonds, drawing 6 % interest, so far as relates to the property which that mortgage covered?

A. I am.

And further deponent saith not.

Stipulation.

At this point it was stipulated between counsel that the mortgage for $250,000.00, referred to in the bill, recites the fact that the exclusive franchise claimed by the Suburban Electric Company in the city of Covington, is included in said mortgage; and the production of a copy of said mortgage is waived.

This stipulation is made for this purpose alone, of avoiding the necessity of filing a certified copy of the mortgage with these depositions, and for no other purpose.

196 And also Mr. BEN MACKE, being first duly sworn, was examined and testified as follows, to-wit:—

Direct examination.

By Mr. CASSATT:

1 Q. Please give your full name?

A. Ben Macke.

2 Q. What relation, if any, did you bear to the Suburban Electric Company? When did your connection with that company commence?

A. My connection commenced January 1st, 1898, as book-keeper.

3 Q. How long did you continue in the employ of the Suburban Electric Company?

A. Well, I continued up to the time—up to April 1st, 1901.

4 Q. Were you employed by the trustee in bankruptcy during the time that he had charge of the Suburban Electric Company?

A. Yes sir.

5 Q. At the time when the assets of the Suburban were transferred to the Union Light, Heat & Power Company, did you enter into the employ of the Union Light, Heat & Power Co.?

A. Yes sir.

6 Q. And how long did you continue in their employ?

A. Up to November 20, 1901.

7 Q. Will you please state whether or not from about the 1st of

April, 1898, bills were rendered to the city of Covington by
197 the Suburban Electric Company for electricity furnished to the city, under the contracts of the Suburban Electric Company with the city of Covington?

A. Yes sir, they were rendered monthly.

8 Q. What action did the city take with reference to said bills?

A. Well, they paid them up to I think the middle of 1899, and then refused to pay them on account of the Suburban Company owning them for taxes.

9 Q. What taxes did the city of Covington claim the Suburban Electric Company owed them, what kind of taxes?

A. Well taxes on real estate, machinery, poles and wires, etc., and franchise tax.

10 Q. And also the franchise tax?

A. Yes sir.

11 Q. What was done, if anything, with reference to the settlement of the amounts due from the city of Covington to the Suburban Electric Company and the trustee of said company, and from the Suburban Electric Company and its trustee to the city of Covington?

A. The taxes were all paid, and also all the light bills up to April 1st, 1901.

12 Q. Have you in your possession any memorandum which was in your custody, as book-keeper of the Suburban Electric Company and Charles H. Shaw, trustee, showing the terms of that settlement?

A. Yes sir.

13 Q. Will you please produce that?

A. This is it. (Producing typewritten paper.)

14 Q. Will you please state by reference to that memorandum, the amount that was paid by the Suburban Electric Company and
198 Charles H. Shaw, trustee, to the city of Covington, on account of franchise taxes due to the city of Covington?

A. (Reading from paper.) The amount of franchise taxes for the years 1895, '96, '97 and 98 was $1270.13, and the franchise tax for 1899 was $143.50; franchise tax for 1900, $254.14.

15 Q. Was that amount paid by Charles H. Shaw, trustee, on behalf of the Suburban Electric Company to the city of Covington?

A. Yes sir.

16 Q. Please state what amount was paid by the city of Covington to Charles H. Shaw, trustee, on behalf of the Suburban Electric Company for light bills.

A. $5710.63.

17 Q. Was that amount paid by the city of Covington to the company?

A. Yes, sir.

18 Q. From the time when the Union Light, Heat & Power Company took possession of the plant and system of the Suburban Electric Company, did it continue to furnish electric light to the city of Covington?

A. Yes sir.

19 Q. Are you able to state how many lights it furnished to the

city of Covington from that time up to the time that your connection with the company terminated, in November, 1901?

A. They had thirty-five arc lamps, and I should say one hundred incandescent lamps.

20 Q. Were the bills for these lamps regularly rendered by the Union Light, Heat & Power Company?

A. Yes, sir, rendered monthly.

21 Q. For what months?

199 A. Since the Union Light, Heat & Power Company took hold.

22 Q. Up to when?

A. Up to the first of November, 1901.

23 Q. When did the Union Light, Heat & Power Company take hold?

A. May 1st, 1901.

24 Q. What action, if any, did the city of Covington take with reference to these bills?

A. They hadn't been paid up to the time I left—not from May 1st, to November 1st.

25 Q. Did the city of Covington refuse to accept the light and order the lights turned off?

A. Not that I know of.

No cross examination.

And further deponent saith not.

It is stipulated between the parties hereto that the witnesses may sign the shorthand notes, and need not sign the transcript, but that the transcript may be read in evidence in the trial of this case, both as to the testimony of Mr. Charles H. Shaw and Mr. Ben Macke.

Whereupon, upon consent of parties, the further taking of these depositions was adjourned to 2.00 p. m. Friday, December 6th, 1901.

200 CINCINNATI, OHIO, *December 6th*, 1901.

The further taking of these depositions was resumed at 2.00 p. m., this date, according to agreement, same counsel being present, under the same stipulation, to-wit:—as entered into on the 30th day of November, 1901.

Thereupon ALEXANDER M. WORTHINGTON, of lawful age, being first duly cautioned and sworn, deposed and testified in behalf of the complainant herein as follows:—to-wit:—

Direct examination.

By Mr. CASSATT:

1 Q. Will you please give your name, residence, and occupation?

A. Alexander M. Worthington, Louisville, Ky.; electric light manager.

2 Q. State the name of the company you are connected with now.

A. Now with the Citizens Lighting Company of Louisville.

3 Q. In what capacity?

A. I am general manager and secretary of the company.

4 Q. Were you ever connected with the Covington Electric Light Company, of Kentucky corporation, doing business in the city of Covington, Ky., if so, when?

A. Yes sir, I was connected with that company in 1891.

5 Q. What was your relation to the company, and on what date did it commence, and when did it terminate?

201 A. I think it began about in January, 1891, and I left there on October 1, 1891—just about.

6 Q. What relation did you occupy to the company?

A. Secretary and treasurer, and general manager.

7 Q. At the time you became connected with the Covington Electric Light Company, please state what, if any, business it was transacting in the city of Covington?

A. It was doing a general business such as all electric light companies do, furnishing power and light for general purposes.

8 Q. Please state what plant, if any, it had in the city of Covington?

A. It had an electric light and power plant situated where the old Covington skating rink was, on Madison avenue between Fourth and Fifth streets.

9 Q. Please describe this plant at that time, how extensive it was, and of what it consisted?

A. Well, it occupied a piece of ground about I would judge 150 feet front by 190 or 200 feet deep. The larger portion of that was covered by their machinery and boilers. It had three boilers, consisting altogether of about 400 H. P. capacity. It had five engines, which I guess consisted of about 600 H. P. altogether; and dynamos, generator, shafting—such as the equipment of an electric plant generally has.

10 Q. At the time stated, please say how many miles of wire approximately were strung in the city of Covington, for the purpose of supplying electric light and power from your plant to consumers?

A. Well, I would judge about twenty-five to thirty miles, something like that.

202 11 Q. Upon what were these wires strung?

A. On poles.

12 Q. Where were those poles situated?

A. They were situated on the streets. The wires were strung on cross irons that were on the poles.

13 Q. The poles were located on the streets of Covington?

A. Yes, sir, on the curb line.

14 Q. Did the Covington Electric Light Company at the time stated, furnish any arc lights upon the public streets of Covington?

A. Yes sir, they did. Those lights were subscribed for by private consumers, merchants on Madison avenue and Pike street. On Fourth and Scott I had one lamp there. The balance were on Madison avenue and Pike street. They were all paid for by private subscriptions.

15 Q. Name some of the merchants?

A. A. Degginger, Farmers & Traders national bank, German

bank, they all paid for light up there, and Blaize, John R. Coppin and the Covington electric railway, and the drug store on the corner, Hermann, I think owned it at that time.

16 Q. At Fourth and Scott?

A. At Fourth & Scott. All those parties subscribed and paid for those lights on the streets at various points. There were a number of others. I cannot call them all now, it has been ten years ago.

17 Q. Where were those lights located with reference to the street or curb lines?

A. The lights? Those arc lights that I just named were located in the center of the streets, or at the intersection of the streets, as the case might determine.

203 18 Q. What was the extent of the business done by the Covington Electric Light Company, in dollars and cents approximately, at the time with reference to which you are testifying?

A. From all sources, do you mean?

19 Q. Yes.

A. Or from the city of Covington only?

20 Q. First, from all sources, and then from consumers in the city of Covington?

A. Well, from all sources I judge from $50,000 to $60,000 as near as I can recollect.

21 Q. Per year?

A. Per annum, yes sir.

22 Q. And how much of this was from consumers in the city of Covington?

A. Well, I would think about from thirty to thirty-five thousand dollars.

23 Q. During the time of your connection with the company as before stated, did the business of the company in the city of Covington increase, or decrease; and in either case, how much?

A. It constantly increased. The first of my connection with the business there, our receipts for illustration were, about three hundred dollars a month, and they went up to in the neighborhood of four thousand dollars a month—four or five thousand dollars a month gross. Now, from the city of Covington itself we received about three thousand dollars a month. That shows you the increase.

204 24 Q. About what were the approximate receipts in January, 1891, the time to which you refer?

A. January, 1891, the receipts I would think they were from four to five thousand dollars.

25 Q. From the business in the city of Covington?

A. No sir, gross business.

26 Q. How much of that was from business in the city of Covington?

A. About three thousand dollars—$2500.00 to $3000.00.

27 Q. During the period after that in which you were connected with the company, what increase, if any occurred in the receipts of the company?

A. Well, there was no marked increase, there was a gradual

growth, you know, a growing demand for electric light and service in various ways, motor service, and so forth, with increasing receipts gradually each month.

28 Q. What extensions, if any were made during that period from January, 1891, to the time when your relations with the company terminated?

A. We put up a great many poles around about. I can't tell you exactly what we did do. We made some extensions on Main street, up on Eleventh, on Madison avenue, and also on Pike. We were gradually growing and increasing and putting our poles all over the city promiscuously—that is, in condensed districts where we thought there was some business.

29 Q. During the time of your connection with the Covington Light Company, was any objection or protest made by the city of Covington, or any of its officers, to the conduct of your business or of an electrical business in the city of Covington, or to the
205 erection of poles and wires on the streets of the city of Covington for the purpose of carrying on the business of the company?

A. No sir.

30 Q. While you were the secretary of this company, did you have in your custody a minute book of the Covington Electric Light Company, showing the records of its stockholders' and directors' meetings?

A. Yes sir.

31 Q. Have you that book now in your possession?

A. Yes sir.

32 Q. I will ask you whether or not this book, which you have handed me now, is the one to which you refer?

A. It is.

(The complainant now offers in evidence said minute book of the Covington Electric Light Company, just testified to by the witness; it is now stipulated and agreed that this book need not be physically attached to the depositions herein, but may be filed therewith and used therewith as evidence upon the trial of this cause; and a copy of said minute book for convenience may be attached to this deposition. Said original minute book is now marked by the notary "Complainant's Exhibit Z," December 6, 1901. And said copy hereto attached and made a part hereof, marked "Complainant's Exhibit Y.")

33 Q. Were you a director or stockholder in this company during the time to which you have testified?

A. Yes sir.

34 Q. Both?

A. Both.

206 Cross examination.

By Mr. HANLON:

1 X Q. Mr. Worthington, you say you became associated with the Covington Electric Light Company in the year 1891?

A. Yes sir.

2 X Q. Isn't it a fact that that was the first year that the Covington Electric Light Company ever did any business in the city of Covington?

A. I don't know that it was.

3 X Q. You are not able to state then whether the Covington Electric Light Company did any business in the city of Covington prior to that time, or not?

A. No sir.

4 X Q. From the time of your association with the Covington Electric Light Company, did the company ever ask permission, or get permission, from the city of Covington, to enter in and upon the streets of the city and erect its poles and string its wires, or to do business in the city of Covington?

A. While I was associated with it?

5 X Q. Yes sir.

A. No sir, they did not seek any.

6 X Q. You never sought any?

A. No sir, we erected them right along continuously without any objection on the part of the city.

7 X Q. How long were you associated with the Covington Electric Light Company?

A. From January until the 1st of October, 1891.

8 X Q. Do I understand you to say, Mr. Worthington, that you were an officer in the Covington Electric Light Company?

A. Yes sir.

207 9 X Q. What office did you hold?

A. Secretary & treasurer, and general manager also.

10 X Q. Isn't it a fact now that from May 1st, 1882, the officers of the Covington Electric Light Company would meet every year, from that time on up until 1891, and elect officers, and that in fact no business was done in the city of Covington from that time up until 1891?

A. I only speak of my association with the company from the time I was in it.

11 X Q. I am just asking you this question: you can answer it yes, or no, or that you don't know.

A. I did not know anything about the company till I got in it.

12 X Q. You in connection with other gentlemen, Mr. Hamilton, Mr. John R. Coppin, Mr. A. Stuart, purchased all the stock originally owned by Mr. T. F. Hallam and J. H. Mulligan, Alexander Davezac and Harvey Meyers?

A. Yes sir.

13 X Q. During your connection with this company, in the year 1891, did you or the officers of that company, at any time discuss the question as to the means or method of procuring permission from

the city of Covington to light the streets of the city, or to enter in and upon the streets of the city, to transact your business?

A. To transact business?

14 X Q. Yes sir.

A. No sir, it was not discussed. We were doing business right along.

208 15 X Q. You say you were secretary of the company?

A. Yes sir.

16 X Q. I will ask you if at the meeting held on March 23, 1891, the subject of street lighting was not brougt up at said meeting and discussed, and the subject of the meeting was stated to be to discuss the subject of public street lighting, and determine which was the best way to proceed to get the contract from the city for all or a portion of same?

A. I have no doubt that we discussed the question of getting the city lighting and all additional business we could during the time I was with the company; and if the minutes show that we had a meeting to discuss that matter, I think that is proof enough that it was discussed in that way. I thought when you asked the former question if we were discussing or had discussed with the city authorities our right to do business in the city of Covington, that we never discussed that, as we continued to do business day in and day out, and that was never open for discussion at all, our right to do business; because we were doing it right along but the question of getting additional business we were always out to do that with the city and with everybody else.

17 X Q. You did consider at the time then during the year 1891, that as a matter of right you had the privilege of entering in and upon the streets of the city of Covington, and erecting your poles and stringing the wires of this company without the consent of the city of Covington, did you?

A. We had exercised that right continuously, and there was no objection made by any of the city authorities to our exercising that right.

209 18 X Q. You exercised this right, you say, during the time that you were associated with the company during the year 1891?

A. Yes sir.

19 X Q. This company never complied with the general ordinance passed by the city of Covington in the year 1883 and 1884 requiring all electric light companies before they could do business in the city of Covington, that said company or companies, should first obtain the permission from the city authorities and execute bond in the sum of twenty thousand dollars, as a guarantee to replace the streets and sidewalk- in good condition, and to keep them in repair, did it?

A. We never had any notice of any kind that we had not complied with all ordinances that were in force.

20 X Q. Mr. Worthington, do you, or not know that the Covington Electric Light Company during the year 1887, or 1888, applied to the city council of Covington for permission to transact business

in the city of Covington, and that permission was refused said company on the ground that said company had not complied with a general ordinance of the city of Covington regulating electric companies, and had never executed the bond required to replace the streets in good condition?

A. Only knowledge I have of the Covington Electric Light Company is from January, 1891.

And further deponent saith not.

By agreement the signature of the witness was waived.

210 *Stipulation.*

At this point it was stipulated and agreed between counsel for the respective parties that the complainant can introduce copies of the original deeds, first, from the Suburban Electric Company to the North American Company; and, second, from the North American Company to the Union Light, Heat & Power Company, and that said copies may be read as evidence in this cause with like force and effect as if they were the originals, subject only to objections as to relevancy and competency.

(Said copies are hereto attached and made a part hereof, marked respectively "Complainant's Exhibits I and J.")

Stipulation.

It is further stipulated and agreed between the parties hereto by their respective counsel that Chas. H. Shaw was appointed trustee in bankruptcy of the Suburban Electric Company at the time set forth in the bill herein; and that the franchise of the Suburban Electric Company passed to him as trustee, and upon his discharge as trustee, it, with the other property, reverted to the Suburban Electric Company.

211 STATE OF OHIO, } *ss:*
Hamilton County, }

I, Frank W. Cottle, a notary public within and for said county, do certify that the above and foregoing depositions of Archibald Stuart, Charles H. Shaw, Ben Macke and Alexander M. Worthington, were taken before me at the office of Ernst & Cassatt, in the First National Bank building, N. W. cor. Third and Walnut streets, Cincinnati, Ohio, on the 30th day of November, 1901, and thereafter as adjourned, in pursuance to agreement; that—

said witnesses were first duly cautioned and sworn by me that the evidence they should give in said action should be the truth, the whole truth, and nothing but the truth, before giving their testimony; that thereafter the depositions of the said witnesses were by stipulation between the counsel for the parties taken down in shorthand and reduced to typewriting by an expert stenographer, the

signatures of the deponents thereto being waived by agreement of the parties by their respective counsel present.

I further certify that at the taking of said depositions the complainants were represented by Messrs. Ernst & Cassatt, and by Mr. Outcalt and Mr. Prior, and the defendants were represented by F. J. Hanlon, city solicitor of Covington, Ky.

In testimony whereof, I have hereunto set my hand and seal this 9th day of December, 1901.

[SEAL.] FRANK W. COTTLE,
Notary Public, Hamilton Co., Ohio.

Commission expiring January 31st, 1904.

Cost of this deposition $51.00 paid by Union Light, Heat & Power Co.

F. W. COTTLE, *Notary.*

212 COMP.'S EXHIBIT A.

An act to incorporate the Covington Electric Light Company.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION I. That Horace W. Woodruff, William B. Moore, Jr., Wm. H. Glore, and their associated, successors and assigns, shall be, and they are hereby created a body politic and corporate by the name of the Covington Electric Light Company, with power and in that name to contract and be contracted with, to sue and be sued, to plead and be impleaded, to answer and defend in all courts and places whatsoever, as a natural person; and to have and use a common seal, and to change, renew or alter the same at pleasure; and to ordain and put in execution such by-laws, rules and regulations for the government of its affairs as it may deem expedient and proper, but the same may be altered or amended at any regular, or called meeting by a majority vote of the paid-up, after a motion to the end shall have been entertained at any regular or called meeting held not less than thirty days before: Ptovided, however, that such by-laws, rules and regulations shall not be inconsistent with the conctitution of this State and of the United States.

SECTION II. That the capital stock of said company shall be fixed bu the corporation aforesaid, but shall not exceed one hundred and fifty thousand dollars, divided into shares of one hundred dollars each. When the sum of five thousand dollars is subscribed and paid up, said company shall have authority to organize and commence
213 business. The share of said stock shall be transferred on the books of the company, according to the by-laws; but the company shall hold a lien upon the shares of any stockholder who may be indebted to it; and such shares shall not be transferable without the consent of the president and directors, until such debt shall have been paid, or discharged. Each share shall entitle the holder to one vote, in person or by written proxy, in all elections of officers, and at all meetings of said company for any purpose.

SECTION III. That said company shall have the right, through its directors, to take from its officers or agents bonds for the faithful discharge of duty, and for the safety and security of its funds and property.

SECTION IV. There shall be elected at each annual meeting of the stockholders a president, vice-president, treasurer, and five directors, and this number of directors may, by a vote as hereinbefore provided, be increased to nine, who shall hold their office for one year, and until their successors are elected, a majority of whom shall constitute a quorum for the transaction of business. Vacancies that may occur in the term of any director or other officer, may be filled by the board. The annual election after the first one, which may take place at any time after organization, shall be held at the office of the company, in the city of Covington, on the second Monday of January of each year. At all meetings of the directory they shall vote in person, and not by proxy.

SECTION V. That the business of said company is limited to furnishing and supplying the city of Covington and its inhabitants and persons and corporations located near said city, with light and motive power, generated by electricity, steam or other
214 artificial means, or to the furnishing and supplying either said light, power or heat, and may charge therefor such price and compensation as may be agreed upon between said company and the individuals or corporations contracting with it; and in aid of its object, it may acquire and hold such real estate as may be necessary for the location of its works and the carrying into effect the purpose of its organization, and the body hereby incorporated shall have the exclusive privilege of conducting the business above described, within and adjacent to said city, for the term of twenty-five years, but a non-user of the privilege of this act of incorporation or five years shall work a forfeiture.

SECTION VI. Said company shall have the privilege, subject to the regulations of the city authorities, to lay its pipes and mains; to erect its poles, posts and wires through and along any street or highway in the city aforesaid or adjacent thereto as it may deem fit; provided, it in no way permanently obstructs the use of the same to the public or any individual; and it is hereby required to place and put in repair any street or highway through which its line of pipes, wires, etc., may pass; but it is allowed to temporarily obstruct for a reasonable time in laying its line and repairing the same.

SECTION VII. The private property of stockholders shall not be liable for the debts of the corporation.

SECTION VIII. This act shall take effect from its passage.

Approved April 22nd, 1882.

215 COMPLAINANT'S EXHIBIT "B."

An act to amend the charter of the Covington Electric Light Company.

An act to amend an act entitled "An act to incorporate the Covington Electric Light Company."

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION I. That an act entitled "An act to incorporate the Covington Electric Light Company," approved April 22nd, one thousand eight hundred and eighty-two, be and the same is hereby amended by striking out in the fifth line of the second section of said act, as it appears in volume the second of the printed acts of the General Assembly of the Commonwealth of Kentucky, passed at the regular session of the General Assembly which was begun and held in the city of Frankfort on Monday, November twenty-eight, one thousand eight hundred and eighty-one, the words "And paid up."

SECTION II. This act shall take effect and be in force from and after its passage.

Approved May 5th, 1884.

216 COMPLAINANT'S EXHIBIT "C."

Articles of Consolidation of the Suburban Electric Company.

Whereas, the Covington Electric Light Company, of Covington, Ky., the Suburban Electric, Illuminating, Heating & Power Company, of Newport, Ky., and the Citizens' Electric Light Company, of Dayton, Ky., are each in full operation, and in active business, supplying electric current for the purposes of illumination and power in the respective cities of Covington, Ky., Newport, Ky., and Dayton, Ky.,

And whereas, the said The Covington Electric Light Company, of Covington, Ky., was incorporated under and pursuant to the following acts:

An act to incorporate the Covington Electric Light Company.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION I. That Horace W. Woodruff, William B. Moore, Jr., Wm. H. Glore, and their associates, successors and assigns, shall be, and they are hereby created a body politic and corporate by the name of the Covington Electric Light Company, with power and in the name to contract and be contracted with, to sue and be sued, to plead and be impleaded, to answer and defend in all courts and places whatsoever, as a natural person; and to have and use a common seal, and to charge, renew or alter the same at pleasure; and

to ordain and put in execution such by-laws, rules and regu-
217 lations for the government of its affairs as it may deem expedient and proper, but the same may be altered or amended at any regular, or called meeting by a majority vote of the paid up, after a motion to that end shall have been entered at any regular or called meeting held not less than thirty days before; provided, however, that such by-laws, rules, and regulations shall not be inconsistent with the constitution of this State and of the United States.

SECTION II. That the capital stock of said company shall be fixed by the corporation aforesaid, but shall not exceed one hundred and fifty thousand dollars, divided into shares of one hundred dollars each. When the sum of five thousand dollars is subscribed and paid up, said company shall have authority to organize and commence business. The share of said stock shall be transferable on the books of the company, according to the by-*alws*; but the company shall hold a lien upon the shares of any stockholder who may be indebted to it; and such shares shall not be transferable without the consent of the president and directors, until such debt shall have been paid or discharged. Each share shall entitle the holder to one vote, in person or by written proxy, in all elections of officers, and at all meetings of said company for any purpose.

SECTION III. That said company shall have the right, through its directors, to take from its officers or agents bonds for the faithful discharge of duty, and for the safety and security of its funds and property.

SECTION IV. There shall be elected at each annual meeting of the stockholders a president, vice-president, treasurer, and five directors, and this number of directions may, by a vote
218 as hereinbefore provided, be increased to nine, who shall hold their office for one year, and until their successors are elected, a majority of whom shall constitute a quorum for the transaction of business. Vacancies that may occur in the term of any director or other officer, may be filled by the board. The annual election after the first one, which may take place at any time after organization, shall be held at the office of the company, in the city of Covington, on the second Monday in January of each year. At all meetings of the directory they shall vote in person, and not by proxy.

SECTION V. That the business of said company is limited to furnishing and supplying the city of Covington and its inhabitants and persons and corporations located near said city, with light and motive power, generated by electricity, steam or other artificial means, or to the furnishing and supplying either said light, power or heat, and may charge therefor such price and compensation as may be agreed upon between said company and the individuals or corporations contracting with it: and in aid of its object, it may acquire and hold such real estate as may be necessary for the location of its works and the carrying into effect the purpose of its organization, and the body hereby incorporated shall have the exclusive privilege of conducting the business above described, within and adjacent to said city, for

the term of twenty-five years, but the non-user of the privilege of this act of incorporation for five years shall work a forfeiture.

SECTION VI. Said company shall have the privilege, subject to the regulations of the city authorities, to lay its pipes, and
219 mains; to erect its poles, posts and wires through and along any street or highway in the city aforesaid or adjacent thereto, as it may deem fit: Provided, it in no way permanently obstricts the use of the same to the public or any individual; and it is hereby required to place and put in repair any street or highway through which its line of pipes, wires, etc., may pass; but it is allowed to temporarily obstrict for a reasonable time in laying its line and repairing the same.

SECTION VII. The private property of stockholders shall not be liable for the debts of the corporation.

SECTION VIII. This act shall take effect from its passage.

Approved April 22nd, 1882.

An act to amend an act entitled "An act to incorporate the Covington Electric Light Company."

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION I. That an act, entitled "An act to incorporate the Covington Electric Light Company," approved April 22nd, one thousand eight hundred and eighty-two, be and the same is hereby amended by striking out in the fifth line of the second section of said act, as it appears in volume the second of the printed acts of the General Assembly of the Commonwealth of Kentucky passed at the regular session of the General Assembly which was begun and held in the city of Frankfort on Monday, November twenty-eight, one thousand eight hundred and eighty-one, the words "And
220 paid up."

SECTION II. This act shall take effect and be in force from and after its passage. Approved May 5th, 1884.

And the Suburban Electric Illuminating, Heating and Power Company of Newport, Ky., was incorporated under the following acts of the General Assembly of the State of Kentucky:

An act to incorporate the Edison Electric Illuminating, Heating & Power Company of Newport, Kentucky.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:—

SECTION I. That T. P. Carrothers, J. J. Hetsch, P. S. Eyer, H. M. Healey, John Halloran, F. R. Brady and William Gildhaus, their associates, successors and assigns be, and they are hereby incorporated and created a body-politic by the name of the Edison Electric Illuminating, Heating and Power Company, of Newport, Kentucky, and shall by such name have perpetual succession, with power to sue and be *used*, contract and be contracted with, including the right to purchase, hold and convey real estate; to have and use a com-

mon seal, and change and alter the same at pleasure; and generally do and perform all things necessary to be done in the conduct of its business hereinafter set forth; to ordain and put in execution such by-laws, rules and regulations for the government of its affairs as may be deemed expedient and proper; and the same may be altered and amended at any regular or called meeting, by a majority of the stock, after a motion to that end shall have been entered at any regular or called meeting held not less than thirty days previous, provided such by-laws, rules and regulations shall not be inconsistent with the constitution and laws of this State or of the
221 United States.

SECTION II. The capital stock of the corporation shall be fixed by the company, but shall not exceed two hundred thousand dollars, and shall be divided into shares of not more than one hundred dollars each.

The stock shall be transferable on the books of the company, according to the by-laws; but the company shall hold a lien upon the shares of any stockholder who may be indebted to it, and such shares shall not be transferable without the consent of the president and directors first had, or until said debt shall have been paid and discharged.

SECTION III. The corporation shall be governed by a board of seven directors, which number may be increased to nine. The directors shall be elected annually by the stockholders from their number on the first Monday of January of each year, and shall hold office until their successors are duly elected and qualified.

The directors shall elect from their number a president and vice-president, and may elect a secretary and treasurer, who shall be stockholders in said company, and may appoint such other officers and agents as may be necessary for the proper conduct of the business affairs of the company, and may fix their compensation, and may receive bond from any or all of them, for the faithful performance of their respective duties. The incorporators above named shall act as directors until a board shall regularly be elected and qualified.

SECTION IV. Each one hundred dollars of stock in said company, whether in one or more shares, shall entitle the holder or
222 holders thereof to one vote, in person or by written proxies, in all elections of officers and all meetings of said company for any purpose.

SECTION V. Said corporation is hereby authorized to create an indebtedness in such an amount as the stockholders may order, and may issue its bonds therefor secured by lien or mortgage upon its property rights, or upon all thereof.

SECTION VI. The private property of the members, stockholders or incorporators of the corporation shall not be liable for the corporate debts or liabilities.

SECTION VII. The general nature of the business of the corporation shall be the erecting, operating and maintaining a general system of electric dynamos and other apparatus for the purpose of generating, furnishing and selling electricity for light, heat and

power, and for any other purpose that the electric current may be applied in the city of Newport, and furnishing and supplying said city and its inhabitants and other persons and corporations, and municipal corporations located in or near the city, with light, heat and power by electric current.

SECTION VIII. Said corporation is authorized, subject to the same regulations and restrictions imposed by the city authorities of Newport upon other corporations in said city, to run its wires and conduits for electric power, lighting and heating in, under, on and over the streets, alleys, and by-ways of the said city and adjacent thereto; provided it shall in no way permanently obstruct the use of
223 the same to the public or any individual; and it is hereby required to place in repair any street or highway under which it may lay its conduits, or in which it may erect its poles, or do such other work consistent with the general nature of the business of the corporation; but it may temporarily obstruct the same.

SECTION IX. Work under this act will be commenced in two years and the work put in operation in five years from the passage of this act.

SECTION X. This act shall take effect and be in force from and after its passage. Approved April 9th, 1890.

An act to amen- an act entitled "An act to incorporate the Edison Electric Illuminating, Heating and Power Company."

Approved April 9th, 1890.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION I. That wheresoever the word "Edison" appears in said charter, it shall be struck out and the word "Suburban" inserted.

SECTION II. This act shall take effect from its passage.

Approved May 15th, 1890.

224 And the Citizens' Electric Light Company, of Dayton, Kentucky, was incorporated under the following act of the General Assembly of the State of Kentucky:

An act incorporating the Citizens' Electric Light Company of Dayton, Kentucky.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION I. That William Hassen, Charles Bird, Anton Beck, John Trapp and W. C. McClain, their associates, successors and assigns be, and they are hereby incorporated and created a body-politic, by the name of the Citizens' Electric Light Company, of Dayton, Kentucky, and shall, by such name, have perpetual succession with power to sue and be sued, contract and be contracted with, including the right to purchase, hold and convey real estate; to have and use a common seal, and change and alter the same at pleasure; and generally do and perform all things necessary to be done and per-

formed in the conduct of its business hereinafter set forth; to ordain and put in execution such by-laws, rules and regulations for the government of its affairs as may be deemed expedient and proper; and the same held not less than thirty days previous: provided, such by-laws, rules and regulations shall not be inconsistent with the constitution and laws of this State or of the United States.

SECTION II. The capital stock of the corporation shall be fixed by the company, but shall not exceed two hundred thousand dollars, and shall be divided into shares of not more than one hundred dollars each. The stock shall be transferable on the books of the company, according to the by-laws; but the company shall hold a lien upon the shares of any stockholder who may be indebted to it, and such shares shall not be transferable without the consent of the president and directors first had, or until said debt shall have been paid and discharged.

SECTION III. The corporation shall be governed by a board of seven directors, which number may be increased to nine. The directors shall be elected annually by the stockholders from their number on the first Monday in January of each year, and shall hold their office until their successors are duly elected and qualified. The directors shall elect from their number a president and vice-president, and may elect a secretary and treasurer, who shall be stockholders in said company, and may appoint such other officers and agents as may be necessary for the proper conduct of the business and affairs of the company, and may fix their compensation and may require bond from any or all of them, for the faithful performance of their respective duties. The incorporators above named shall act as directors until a board shall be regularly elected and qualified.

SECTION IV. Each one hundred dollars of stock in said company, whether in one or more shares, shall entitle the holder or holders thereof to one vote, in person or by proxy, in all elections for officers, and all meetings of said company for any purpose.

SECTION V. Said corporation is hereby authorized to create an indebtedness in such amount as the stockholders may order, and may issue its bonds therefor, secured by lien or mortgage upon its property rights or upon all thereof.

SECTION VI. The private property of the members, stockholders or incorporators of the corporation, shall not be liable for corporate debts or liabilities.

SECTION VII. The general nature of the business of the corporation shall be the erecting, operating and maintaining of a general system of electric dynamos and other apparatus for the purpose of generating, furnishing and selling electricity for light, heat and power, and for any other purpose that the electric current may be applied in the city of Dayton, and furnishing and supplying said city and its inhabitants and other persons and corporations and municipal corporations located in or near said city with light, heat and power by the electric current.

SECTION VIII. Said corporation is authorized subject to the same regulations and restrictions imposed by the city authorities of Dayton upon other corporations in said city, to run wires and conduits for

electric power, lighting and heating in, under, on and over the streets, alleys, and by-ways of said city and adjacent thereto; provided it shall in no way permanently obstruct the use of same to the public or any individual; and it is hereby required to
227 place in repair any street or highway under which it may lay its conduits, or in which it may erect its poles, or do such other work consistent with the general nature of the business of the corporation: but it may temporarily obstruct the same.

SECTION IX. Work under this act shall be commenced in two years, and the work put in operation within five years from the passage of this act.

SECTION X. This act shall take effect and be in force from and after its passage.

Approved April 17th, 1890.

228 And whereas, the said several companies, and each of them, are desirous of availing themselves of the provisions of an act of the General Assembly of the State of Kentucky, entitled "An act providing for the creation and regulation of private corporations," which became a law April 5th, 1893, to become consolidated under the name of the Suburban Electric Company; and

Whereas, the value of the properties, both tangible and intangible, of said several corporations are very unequal, and the franchises of each very valuable, but not equally so, and in order to equalize the same and to obtain the consent of the several stockholders in each of said corporations, it has been agreed by and between them that the consolidated corporation should be capitalized at two hundred and fifty thousand dollars.

Bonds shall be divided among the several corporations in the proportion in these articles hereinafter set forth; the old stock in said several corporations being called in ans canceled, and all obligations bonded or floating, of each of said several corporations being fully liquidated and paid: and

Whereas, to that end these articles having been submitted to meetings of the stockholders of each of said several companies, unanimously adopted the following resolutions;

"Resolved, That the plan of consolidation embodied in the articles submitted to this meeting be approved, concurred in and adopted, and that the several stockholders execute the same as required by law, and that on behalf of this corporation the president and
229 secretary thereof do execute the same as required by law, and that, on behalf of this corporation, the president and secretary thereof do execute the same in the name of the corporation."

Now therefore, be it known that the said The Covington Electric Company of Covington, Kentucky, The Suburban Electric Illuminating, Heating & Power Company, of Newport, Kentucky, and the Citizens' Electric Light Company of Dayton, Kentucky, do hereby, pursuant to the provisions of the law of this State upon the subject, consolidate under the name and style of "The Suburban Electric Company," retaining to the consolidated company each and all the

properties, franchises, licenses, privileges, business, credits, assets and effects granted unto each constituent corporation by the said several acts of incorporation of the General Assembly of the State of Kentucky hereinbefore recited or otherwise acquired by each of said several constituent corporations, and being bound for all contracts, liabilities and obligations of each of said constituent corporations and controlled by any and all limitations in said several acts of incorporation; that the capital stock of the consolidated company shall be two hundred and fifty thousand dollars divided into twenty-five hundred shares of one hundred dollars each, transferable only upon the books of the company under such regulations as the by-laws of the company may provide; that the consolidated corporation shall be governed by nine directors, who shall from among themselves choose a president and vice-president and recording secretary, and shall elect and employ a secretary and treasurer, superintendent and such other employees as they may deem proper.

230 The directors shall be annually elected at the principal office of the company on the second Wednesday in April, and the other officers within a week thereafter, all to serve for one year and until their successors shall be elected, unless theretofore removed by the board:

That said consolidated corporation shall have its principal place of business at Newport, Kentucky: and shall commence business as soon as by law it may, and continue until dissolved according to law, not, however, exceeding one hundred years; that the private property of stockholders and incorporators shall continue to be exempt from the payment of the corporate debts; and the highest amount of indebtedness or liability the consolidated corporation may at any time incur shall not exceed two hundred and fifty thousand dollars in addition thereto: that the following named persons, to-wit; Geo. W. Green, H. M. Healey, A. Stuart, H. Buchanan, Jr., J. R. Coppin, E. J. Hickey, F. C. Kemp, J. T. Cooney, and C. J. Helm shall act and be the directors of the consolidated corporation for the term beginning April 11th, 1894, and until their successors shall be duly elected; that the boards of directors shall issue certificates for paid-up stock in the consolidated company, and shall cause to be duly executed and delivered a deed of trust or mortgage covering all the properties, franchises, and effects now or hereafter acquired of or by the consolidated corporation in trust, to secure the payment of two hundred and fifty thousand dollars of thirty year gold bonds bearing six per cent. interest, payable semi-annually, evidenced by coupons, which bonds and coupons they shall also cause to be duly executed, and they shall of said stock and bonds, when issued, deliver to A. Stuart, for the

231 stockholdersof the Covington Electric Light Company, twelve hundred and fifty shares of the capital stock and bonds of the consolidated corporation to the amount at par of one hundred and sixteen thousand dollars; and to C. J. Helm in trust for the stockholders of the Suburban Electric Illuminating, Heating & Power Company, of Newport, Ky., a certificate for nine hundred shares, and bonds of the consolidated corporation to the amount at

par of eighty-three thousand five hundred dollars; and to H. Buchanan, Jr., for the stockholders in the Citizens' Electric Light Company of Dayton, Ky., a certificate for three hundred and fifty shares of stock, and bonds of the consolidated corporation to the amount at par of thirty-two thousand five hundred dollars, and they shall retain in the treasury of the consolidated company eighteen thousand five hundred dollars of its said bonds, to be used for the purpose of the corporation.

In witness whereof, said several corporations this 11th day of April, 1894, have hereunto caused their several seals to be hereto affixed, and these articles duly executed by their several presidents and secretaries, and each of the stockholders of each of said constituent corporations have hereunto set their hands.

232 THE COVINGTON ELECTRIC LIGHT COMPANY,

[SEAL.] By A. STUART, *Pres.*
GEO. W. GREENE, *Secretary.*

SUBURBAN ELECTRIC ILLUMINATING, HEATING & POWER CO.,

[SEAL.] By H. M. HEALEY, *President,*
By H. BUCHANAN, JR., *Secretary.*

THE CITIZENS ELECTRIC LIGHT CO.,
By A. STUART, *President,*
By A. J. GOETZE, *Secretary.*

CHAS. J. HELM.
A. STUART.
H. M. HEALEY.
JOHN P. NEWMAN.
F. C. KEMP.
T. J. COONEY.
JOSEPH G. FETH.
HARVEY MEYERS.
CASPER HEEG.
G. HOLZHAUER.
WILLIAM TIMMER, JR.
A. J. GOETZE.
GEO. W. GREENE.
H. BUCHANAN, JR.

233 COMMONWEALTH OF KENTUCKY, *Campbell County,* } *sct:*

I, Thomas Jones, clerk of the county court for the county aforesaid, do hereby certify that these articles of consolidated of the Covington Electric Light Company, the Suburban Electric Illuminating, Heating & Power Co., the Citizens' Electric Light Company, were, on the 11th day of April, 1894, presented to me at my office by the subscribers thereto, and acknowledged by them to be their act and deed, and *was* by them lodged for record on the same day. Whereupon said articles and this certificate are duly admitted to record in my office.

Given — my hand this 11th day of April in the year 1894.

THOMAS JONES, *Clerk*,
By C. HEEG, *Clerk*.

COMMONWEALTH OF KENTUCKY, }
Kenton County. }

I, Wes. B. Wilson, clerk of Kenton county court, certify that this instrument of writing was this day lodged for record in my office certified as above, whereupon the same with the foregoing and this certificate have been duly recorded in my office. Given under my hand this April 23rd., 1894.

WES. B. WILSON.

234 COMPLAINANT'S EXHIBIT "D."

Whereas, the Covington Gas Light Company is the successor of James Southgate and associates to whom by an ordinance entitled "An ordinance to light with gas the city of Covington." Approved October 28th, 1852, was given the privilege of constructing and maintaining gas works to supply the city of Covington and its inhabitants with gas light and—

Whereas, section 7 of said ordinance is in the following words:—"That said city council shall have the right and privilege, by giving one year's previous notice in writing of purchasing from said James Southgate and associates, their successors and assigns, all the pipe, buildings, privileges, and apparatus constituting the gas works, on the first day of January 1896, and at the expiration of each and every term of 5 years thereafter. The price or value of said gas works to be ascertained and determined by five disinterested persons residents of Kentucky, two of whom shall be chosen by the said city council, and two by said James Southgate and associates their successors and assigns, and the fifth by the four so chosen." And—

Whereas, the city of Covington cannot by reason of the constitutional inhibition from increasing her debt avail herself of the right and privilege thereby retained; and—

Whereas, the city of Covington is desirous of cheapening the price of gas for its inhabitants and for itself and—

Whereas, the Suburban Electric Company has offered to
235 greatly reduce the price of gas for the city of Covington and its inhabitants and to give the city of Covington the option to change the street lighting from gas to electricity if it can acquire the gas works of the Covington Gas Light Company under the terms of the aforesaid section 7 and to give the consideration hereinafter mentioned for an assignment and transfer of the said right and privilege.

Now therefore; for and in consideration of the premises and of the covenants and agreements on the part of the Suburban Electric Company hereinafter set forth, the city of Covington does hereby assign and transfer, without warranty to the Suburban Electric Company of Newport Kentucky all of the rights and privileges

secured to it under section 7 of the said ordinance entitled "An ordinance to light with gas the city of Covington," approved October 28th, 1852, which section is set forth in full in the preamble hereof; the said assignment and transfer is however subject to the following condisitons:—

1st. That it shall not be assigned or transferred by the said Suburban Electric Company.

2nd. That when the said Suburban Electric Company shall have acquired the said gas works of the Covington Gas Light Company under the right and privilege hereby assigned and transferred it shall not charge for gas furnished to either the city of Covington or its inhabitants, to exceed one dollar and ten cents ($1.10) per thousand cubic feet with a deduction of ten cents per thousand cubic feet if the bill- for gas shall be paid at said company's office within ten days after they are due and payable.

236 3rd. That when the said Suburban Electric Company shall have acquired the said gas works from the Covington Gas Light Company under the right and privilege hereby assigned and transferred, the city of Covington shall have the option to change the lighting of its streets until the end of the term fixed in the said ordinance, entitled "An ordinance to light with gas the city of Covington," approved October 28th, 1852, from gas to electricity upon terms to be agreed upon, but the price to be charged for electric arc lights of two thousand candle power (nominal) shall not exceed $90.00 per year per light.

And the said Suburban Electric Company does hereby accept said assignment and transfer with each and all the conditions annexed thereto and for and in consideration thereof does hereby agree and contract with the city of Covington that it will,

1st. Wire the court house and jail and supply the lamps for lighting said buildings according to the specifications hereto attached; and wiring and lamps to become the property of the city of Covington:—

2nd. Furnish the electric current to supply lights in said court house and jail for one year:

3rd. Furnish, erect, maintain and supply electric light for 35 arc lights of two thousand candle power (nominal) on Madison avenue between 2nd and 16th streets and on Pike street between Madison avenue and Main streets for a period of one year according to the specifications hereto attached.

237 It is further understood that the Suburban Electric Company shall have the right to use the name of the city of Covington when it shall be necessary or advantageous to do so in the enforcement of the right and privilege hereby transferred and assigned.

And the Suburban Electric Company hereby agrees to hold the city of Covington harmless from any and all damage which may arise from the transfer and assignment of the right and privilege retained by the city of Covington, in said section 7 and because of the substitution of electric light on Madison avenue and Pike street, the Suburban Electric Company will pay the damages to the Covington Gas

Light Company for the failure to burn the gas in the lamps on said Madison avenue between 2nd and 16th streets and on Pike street between Madison avenue and Main street, or if they may not be turned out, then will pay the bills for the gas consumed by the said lamps for the period of one year.

In witness whereof the said City of Covington by its mayor Jos. L. Rhinock and the Suburban Electric Company by its president A. Stuart, have this 27th day of December 1897, in duplicate hereto set the name and a-fix- the seal of the said City of Covington, and the said Suburban Electric Company.

[SEAL.] THE SUBURBAN ELECTRIC COMPANY,
By A. STUART, *President.*
THE CITY OF COVINGTON, KY.,
[SEAL.] By JOS. L. RHINOCK, *Mayor.*

238 *Specifications.*

For lighting Madison avenue from 2nd street to 16th street and Pike street from Madison avenue to Main street with thirty-five (35) arc lights of (nominal) two thousand candle power (2000) each.

We will furnish all material erect the same, locating them within the prescribed territory at points designated by the city council or its authorized committee.

They will burn thirty-six hundred and sixty one and one quarter (3661¼) hours each per year, which will be arranged into a regular schedule of lighting and extinguishing, to be agreed upon by the council, or its authorized committee.

We will furnish the currect maintain and operate said thirty five (35) lamps during the term of the contract in a thorough and first class manner.

The quality of light furnished, equal to any supplied to any of the adjoining cities.

All lamps and material furnished by us to light and operate the said thirty-five (35) lamps are to remain our property at the expiration of the contract.

Specifications.

For lighting court house and city jail.

There will be two hundred and two (202) lights of sixteen (16) candle power each, installed in the buildings.

Court house.

239 Third floor will be concealed work.
Switches on each room except county clerk's office.
Estimated number of lights one hundred and five (105)

City jail.

Police court room, judge's office, and hall, concealed work.

Switches on court room, judge's office, hall, upstairs and dow police office, and private office.

Jailer's residence to have lights placed where gas jets now are.

Basement and engine room lights to the number of nineteen (1 installed where most convenient.

The wiring and other apparatus necessary for the successful ope ation of lights will be of the best quality.

We also furnish lamp renewals free of charge, when they ar burnt out.

In the event they are broken, we will charge twenty-five (25c cents each for renewals.

We will also keep everything in working order avoidable acc dents and carelessness of the city's employees excepted, during th term of the contract.

If the city council or its authorized committee, so desire it, we wi furnish lamps of two (2) four (4) or six (6) candle power each, to b used in places where it is necessary to burn lamps all night.

At the expiration of the contract, all material installed for th necessary operation of said lights, in said buildings, to become th property of the city.

240 *Location of Lights in Court House.*

16 county clerk's office.
3 county judge's office.
6 sheriff's office.
3 engineer's office.
1 janitor's room.
3 main hall.
8 mayor's office.
4 city solicitor's office.
4 water closets.
8 treasurer's office.
3 auditor's office.
7 city clerk's office.
2 hall upstairs.
19 circuit court room.
3 jury room.
3 ladies' reception room.
1 vestibule.
3 master commissioner's office.
5 circuit court clerk.
3 judge's office.

City Jail building.

3 entrance from court house yard.
5 corridor.
2 second corridor.

6 corridors upstairs.
19 basement and engine room.
1 bath room.
1 water closet.
241 16 entrance to building from court avenue.
3 court room hall.
12 police court room.
4 police judge's room.
3 hall third floor.

Jailer's residence.

1 back room.
2 dining room.
1 adjoining room.
2 front hall.
3 sitting room.
4 jailor's office.

Second floor.

2 hall.
1 bath room.
1 sewing room.
4 in bed rooms.
1 closet.

Third floor.

1 hall.
3 in bed rooms.

THE SUBURBAN ELECTRIC COMPANY,
By A. STUART, *President.*

242 *Bond.*

The Suburban Electric Company, principal, and the America Bonding and Trust Company of Baltimore city, Maryland, suret do hereby acknowledge themselves indebted to the City of Covin ton in the sum of forty thousand ($40,000.00) dollars to be void, ho ever, if the said Suburban Slectric Company shall well and tru perform and keep each and all of its covenants in the above contra otherwise to be in full force to the extent of the damage that ma be sustained by the said City of Covington, not however to exce $40,000.00.

Witness their names and seals this 27th day of December 1897.

THE SUBURBAN ELECTRIC COMPANY,
[SEAL.] By A. STUART, *President.* [SEAL.]
THE AMERICAN BONDING AND TRUST COM PANY,
By W. P. FLANDERS, *Att'y in Fact.* [SEAL.]
By BEN A. ADAMS, *Att'y in Fact.* [SEAL.]
[SEAL.]

Accepted and approved by the board of councilmen Dec. 27th 1897.

Accepted and approved by the board of aldermen Dec. 27th., 1897.

Approved this 28th day of December 1897.

JOS. L. RHINOCK, *Mayor.*

(Miscellaneous Contract Book No 1 page 144.)

243 I certify that the foregoing writing is a true and exact copy of the original record on file in my office.

J. F. VAN HOENE, *City Clerk,*

[SEAL.] Per R. M. RYAN, *D. C.*

244 COMPLAINANT'S EXHIBIT "E."

A regular meeting of the board of councilmen of the city of Covington was held in the council chamber Monday evening November 29th, 1897;

President Nienaber in the chair and all the members present except Messrs. Hohnhorst, Lohre, Lueke, and Ruh.

Minutes of the last meeting were read and approved.

Mr. Gahan presented the following:

Council resolution No. 419.

Be it resolved That the city solicitor and law committee be instructed to give their opinion at the next regular meeting by what right the Suburban Electric Light Company is operating in this city.

JAS. H. GAHAN.

Said resolution having passed its first reading was referred to the committee on law and solicitor.

On motion the board of councilmen adjourned.

A. NIENABER, *President.*

Attest: J. T. VAN HOENE, *City Clerk.*

I certify that the foregoing writing is a true and exact copy of the original record on file in my office.

J. T. VAN HOENE, *City Clerk,*
Per R. M. RYAN, *D. C.*

245 COMPLAINANT'S EXHIBIT "F."

A regular meeting of the board of councilmen of the city of Covington was held in the council chamber Monday evening, December 27th, 1897.

President Nienaber in the chair and all members present except Messrs. Clark, Messingschlager, Nowland, and Pohlmann.

Minutes of last regular and adjourned meetings were read and approved.

On motion of Mr. McLean the rules were suspended for the purpose of offering the following report.

To the general council.

GENTLEMEN: Your committee on law and solicitor to whom was referred C. R. No. 418 resolution in reference to the authority of the Suburban Electric Company to do business in the city of Covington respectfully report as follows:—

On the 22nd day of April, 1882, the legislature of Kentucky passed "An act to incorporate the Covington Electric Light Company," said company to have a capital stock of not to exceed $150,000.00.

Said company was given the right to furnish and supply the city of Covington and its inhabitants and persons and corporations located near said city with light and motive power generated by electricity, steam or other artificial means and to charge such prices as may be agreed upon between the company and individuals and the corporations contracting therefor.

Said company was given the privilege subject to the regulations of the city authorities to lay its pipes and mains, erect its
246 poles, wires and etc., along the streets and highways of the city of Covington, provided, it in no way permanently obstructed the use of the same to the public or any individual.

On April 9th, 1890, the legislature of Kentucky passed "An act to incorporate the Edison Electric Illuminating, Heat and Power Company of Newport, Kentucky," with a capital stock not to exceed $200.000.00.

The nature of the business was to erect, operate and maintain a general system of electric dynamo and other apparatus for the purpose of generating, furnishing and selling electricity for light, heat, power, and any other purpose that the electric current may be applied in the city of Newport and to furnish said city and its inhabitants and other persons, corporations and municipal corporations, located in or near said city with light, heat and power, by the electric current.

On April 17th, 1890 the legislature of the States of Kentucky passed an act to incorporate the Citizens' Electric Light Company. This company had authority to furnish electricity and etc., for Dayton, Campbell county, Kentucky.

On the 11th day of April, 1894, all the above mentioned companies were consolidated, under the Kentucky statutes authorizing such consolidation under the name of the Suburban Electric Company with a capital stock of $250.000.00 said company retaining the rights and privileges granted in each of the above named charters.

247 The articles of consolidation were filed in the clerk's office in Newport, Kentucky, and are filed with the secretary of State at Frankfort, Kentucky.

On June 21st., 1883, the general council passed an ordinance in reference to the use of streets by corporations furnishing electricity, in which ordinance it was provided that a bond of $20,000.00, should be given conditioned that said company, should comply with terms of said ordinance.

It seems that this ordinance was never enforced as to the Covington Electric Light Company, and inasmuch as said ordinance has never been re-enacted, since the adoption of the present charter, it is at this time, void and inoperative.

We are of the opinion, that said company has the right to do business in the city of Covington, by reason of the above legislative exactments, subject to the regulations of the city authorities to lay its pipes, and mains, erect its poles and etc., along any street in the city of Covington, and according to the terms of the legislative enactments of April 22nd., 1882.

M. H. McLEAN,
JAS. H. GAHAN,
JAMES J. MOLONEY,
Committee on Law.

WM. McD. SHAW,
City Solicitor.

Concurred in ayes—12 and nays—0.
On motion the board of councilmen adjourned.

A. NIENABER, *President.*

Attest:
J. T. VAN HOENE, *City Clerk.*

(Council Record, volume 8, pages 545–546–547.)

248 I certify that the foregoing writing is a true and exact copy of the original record on file in my office.

J. T. VAN HOENE, *City Clerk,*
Per M. R. RYAN, *D. C.*

249 COMPLAINANT'S EXHIBIT "G."

Contract Between the City of Covington, of the First Part, and the Suburban Electric Company, of the Second Part.

It is hereby agreed by and between the City of Covington of the first part, and the Suburban Electric Company of the second part that in consideration of the payments hereinafter mentioned by the party of the first part to the party of the second part, the party of the second part hereby agrees to light Madison avenue from 2nd street to 18th street, and Pike street from Madison avenue to Main street, with thirty-five (35) arc lights such as are now used on said streets and in accordance with the specifications hereto attached for the sum of ninety ($90.00) dollars per lamp per year for the period of one (1) year from April 1st., 1899, to April 1st, 1900.

The party of the first part shall have the right to deduct at the prices paid for any outage of any lamp or lamps during the time of lighting.

It is further agreed that the party of the second part shall place a meter in the court house and one in the jail and to furnish the incandescent lighting for said buildings at fifteen (15c.) cents per one

thousand (1000) watts meter measurement, and to keep all the lamps in good repair in the court house and jail and to do any repairing that may be necessary, free of any expense to the city during the continuance of the use of said light in the court house and jail, and it is expressly understood that the city of Covington can discontinue any of said lighting at its option at the end of any month it may deem proper.

250 The party of the second part agrees to furnish said lighting and to do all the things set out in the specifications hereto attached.

The party of the second part further agrees to allow a discount of thirty-three and one third (33-⅓) % on all bills for lighting either the court house or jail.

In consideration of the party of the second part complying with the terms of this agreement, the party of the first part shall pay to the party of the second part the sum of ninety ($90.00) dollars per light per years for thirty-five (35) arc lights, and the sum of fifteen (15c.) cents per one thousand (1000) watts, as shown by the meter measurement with a discount of thirty three and one third (33-⅓) per cent. on all bills for lighting the court house and jail said bills to be paid monthly, as other bills of the city of Covington are paid.

It is further agreed by and between the parties hereto that the party of the second part shall hold the party of the first part harmless from any and all damage which may arise or accrue to the party of the first part by reason of the party of the first part's failure to burn the gas in the lamps on Madison avenue between 2nd and 18th streets, and on Pike street, between Madison avenue and Main street.

And it is understood and agreed that if the city of Covingtan is compelled to pay in full or in part the Covington Gas Light Company for the city's failure to use or light the streets with gas between said parties then and in that event the party of the second

251 part agrees to pay the party of the first part the said sum which the city is compelled to pay to the Covington Gas Light Company by reason of its failure to light with gas said streets between said points.

It is further agreed by the parties hereto that this contract shall in no way interfere with, abrogate, modify, or change in any particular any contract or contracts heretofore entered into by and between the parties hereto and this is a contract simply for the period of one year from April 1st 1899 to April 1st 1900, unless the city discontinues said lighting at an earlier date.

The party of the second part hereby agrees to furnish to the party of the first part a bond in the sum of five thousand ($5,000.00) dollars, that it will faithfully execute the provisions of this contract and agrees to give said bond within ten days after the approval of this contract.

Witness our hands this 24th day of April 1899.

SUBURBAN ELECTRIC COMPANY,
By A. STUART, *President.*

252 *Specifications.*

For lighting Madison avenue from 2nd street to 18th street and Pike street from Madison avenue to Main street with thirty-five (35) arc lights of (nominal) two thousand (2000) candle power each.

We will furnish all material, erect the same, locating them within the prescribed territory at points designated by the city council, or its authorized committee.

They will burn thirty six hundred and sixty one and one quarter (3661¼) hours each per year, which will be arranged into a regular schedule of lighting and extinguishing to be agreed upon by the council or its authorized committee.

We will furnish the current, maintain and operate said thirty five (35) lamps during the term of the contract in a thorough and first class manner.

The quality of light furnished equal to any supplied to any of the adjoining cities.

All lamps and material furnished by it to light and operate the said thirty five (35) lamps are to remain our property at the expiration of the contract.

Specifications.

For lighting court house and city jail.

There will be two hundred and two (202) lights of sixteen (16) candle power each, installed in the buildings, and the city of Covington shall have the right at the end of any month to discontinue any or all of said lighting in the court house building. We also furnish lamp renewals free of charge when they are burned
253 out. In the event they are broken we will charge twenty five (25c.) cents each for renewals.

We will also keep everything in working order avoidable accidents and carelessness of the city's employees excepted during the term of the contract.

If the city council, or its authorized committee so desire it, we will furnish lamps of two (2) four (4) or six (6) candle power each, to be used in places where it is necessary to burn lamps all night.

Location of Lights in Court House.

16 county clerk's office.
3 county judge's office.
6 sheriff's office.
3 engineer's office.
1 janitor's room.
3 main hall.
8 mayor's office.
4 city solicitor's office.
4 water closets.

8 treasurer's office.
3 auditor's office.
7 city clerk's office.
2 hall upstairs.
19 circuit court room.
3 jury room.
3 ladies' reception room.
1 vestibule.
3 master commissioner's room.
5 circuit court clerk.
3 judge's office.

254 City jail building.

3 entrance from court house yard.
1 corridor.
2 second corridor.
6 corridors upstairs.
19 basement and engine room.
1 bath room.
1 water closet.
16 entrance to building from Court avenue.
3 court room hall.
12 police court room.
4 police judge's room.
3 hall third floor.

Jailer's residence.

1 back hall.
2 dining room.
1 adjoining dining room.
2 front hall.
3 sitting room.
4 jailor's office.

Second floor.

2 hall.
1 bath room.
1 sewing room.
4 in bed rooms.
1 closet.

255 Third floor.

1 hall.
3 in bed rooms.

Bond.

The Suburban Electric Company principal and —— —— surety do hereby acknowledge themselves indebted to the City of Covington in the sum of five thousand ($5,000.00) dollars to be void however, if the said Suburban Electric Company shall well and truly perform and keep each and all of its covenants in the above contract otherwise to be in full force to the extent of the damage that may be

sustained by the said city of Covington not however to exceed five thousand ($5,000.00) dollars.

Witness their names and seals this — day of ——, 1899.

Accepted by the board of councilmen April 24th, 1899.
Accepted by the board of alderman April 27th, 1899.
Approved this 5th day of June 1899.

JOS. L. RHINOCK, *Mayor.*

(Miscellaneous Contract Book No. 7 page 175.)

I certify that the foregoing writing is a true and exact copy of the original record on file in my office.

J. T. VAN HOENE, *City Clerk,*
[SEAL.] Per R. M. RYAN, *D. C.*

256 COMPLAINANT'S EXHIBIT "H."

An ordinance to enable the Covington Electric Light Company to exercise the franchises granted by act of the General Assembly of Kentucky.

1. Be it ordained by the city council of Covington:

That, for the purpose and with the rights and privileges, and under the restrictions set forth in the act of the General Assembly of Kentucky, approved April 22nd, 1882, entitled "An act to incorporate the Covington Electric Light Company," the said Covington Electric Light Company is hereby empowered to lay its pipes and mains through and along the streets and alleys of the city of Covington, under the supervision of, and in such reasonable manner as may be prescribed by, the committee of internal improvements of council.

2. That the privileges hereby granted extend only to the laying of such pipes and mains as are necessary to supply this city and vicinity with light and heat and motive power, generated by electricity, steam or other artificial means, and shall not be so exercised as to injure or interfere with any sewer, gas pipe, telegraph or telephone pole or wire in said city.

3. That the said privilege shall be so exercised as not permanently to obstruct the use of any street or alley or to injure any public or private property, and is granted only on condition, that within such reasonable time, as shall be prescribed by said committee, the said company shall put in good repair all streets and public places, which may be torn up in the exercise of said privilege.

257 4. This ordinance shall take effect from its passage and shall continue in force for twenty-five years from the 22nd day of April, 1882, provided, however, that a non-user, for one year, or any abuse of the privilege herein granted either by injury or obstructions to public or private ways or property, or by failure to replace streets or alleys in good repair, within a reasonable time, shall operate a forfeiture.

5. Any or all repairs of streets, alleys, highways or other public property and any and all removals of obstructions thereon, rendered necessary by the exercise of the privileges herein granted, may be made by the city at the expense of said company, and said privilege shall not be exercised until said company shall have signified its acceptance of the terms of this ordinance.

Passed and approved October 5th, 1882.

258 COMPLAINANT'S EXHIBIT "I."

This indenture, made this 30th day of April, A. D. 1901, by and between The Suburban Electric Company, a corporation duly organized and existing under the laws of the State of Kentucky, party of the first part, and The North American Company, a corporation duly organized and existing under the laws of the State of New Jersey, party of the second part, witnesseth:

Whereas, the directors of the party of the first part, at a meeting by them held on the 25th day of April, 1901, did receive a proposition from the party of the second part for the purchase of all of the property and assets of every kind and description, belonging to the party of the first part, including all of its rights, privileges, franchises, contracts claims, choses in action, except its franchise to be a corporation; which proposition was by said directors referred and submitted to the stockholders of the party of the first part with the recommendation that the same be accepted; and—

Whereas, the stockholders of the party of the first part, at a meeting of them held on the 25th day of April, 1901, did receive said proposition of the party of the second part and said recommendation for the acceptance of the same made by said directors as aforesaid, and did by the unanimous vote of all the stockholders of said company accept said proposition of the party of the second part, and did by a like vote, authorize and direct the president and secretary of this company to make, execute, acknowledge and deliver on behalf of this company proper deeds or other instruments in writing conveying to said The North American Company party of the second part hereto, all of the property, real, personal and mixed,
259 of every kind and character belonging to this company, including all of its rights, privileges, contracts, choses in action, and franchises, except its franchise to be a corporation, and to do all other things necessary and proper to be done to carry said resolution into effect: and the deed of conveyance hereinafter set out being presented to said meeting was approved; and—

Whereas, at a meeting of the directors of said party of the first part, held on the 25th day of April, 1901, and subsequent to the meeting of the stockholders of the party of the first part hereinabove referred to, the action of said stockholders was approved, ratified and confirmed, and the president and secretary of this company were by an unanimous vote of the said directors authorized and directed to make, execute, acknowledge and deliver the deed of conveyance

above referred to and bring this deed of conveyance, under the seal of the party of the first part, to be attested by its secretary conveying all of its property, real, personal or mixed, and all of its rights, privileges, contracts and franchises, except its franchise to be a corporation, and to deliver the same upon the payment of the agreed purchase price;

Now, therefore, this indenture witnesseth; That the Suburban Electric Company, a corporation organized under the laws of the State of Kentucky, in consideration of the premises, and of the sum of one dollar ($1.00), and of other good and valuable considerations, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, remised, released, conveyed and confirmed, as-
260 signed, transferred and set over, and by these presents does hereby grant, bargain, sell, alien, remise, release, convey, *convey* and confirm, assign, transfer and set over unto the North American Company, a corporation under the laws of the State of New Jersey, its successors and assigns forever, all the property, real, personal and mixed, corporeal and incorporeal, of whatever name and nature, now owned by the said The Suburban Electric Company, including all of its rights, privileges and franchises, except its franchise to be a corporation, and more particularly described as follows:—to-wit:—

A parcel of land situated in the city of Covington, county of Kenton, State of Kentucky, beginning at a point in the east line of Madison avenue, at the northeast corner of Madison avenue and an alley running parallel to and between Fourth and Fifth streets; thence northwardly along the east line of said Madison avenue towards Fourth street, 90 feet; thence at right angles to Madison avenue, 190 feet to another alley; thence with said other alley and at right angles to the first named alley, 90 feet to said first named alley; thence westwardly along the same, 190 feet, to the place of beginning; subject, however, to such lien as Caroline B. Smith, Frank E. Smith, her husband, George M. Casey, or either of them, may have upon the same, which lien is as yet undetermined in amount.

Also, the following described real estate, situated in the city of Newport, Campbell county, Kentucky, to-wit:—lot No. 260, in "the Cotes Brilliant Lot and Home Company's subdivision," fronting thirty feet on the west side of Parke avenue, and extending back 120 feet to an alley.

261 *Also*, all of its personal property of every kind and character, including machinery, boilers, furnaces, materials, poles, wires, mains, fenders, dynamos, fixtures, connections, appliances and appurtenances of every kind and character.

Also, a certain exclusive franchise, for a period of twenty-five years from April 22, 1882, for furnishing and supplying the city of Covington and its inhabitants and persons and corporations located near said city with light and motive power, generated by electricity, steam or other artificial means, granted by the General Assembly of Kentucky to the Covington Electric Light Company, by the act approved April 22, 1882.

Also, a certain franchise, not limited as to time, for generating, furnishing and selling electricity for light, heat and power, and for furnishing and supplying the city of Newport and its inhabitants and other persons and corporations, and municipal corporations, located in or near said city, with light, heat and power by the electric current, granted by the General Assembly of Kentucky to the Edison Electric Illuminating, Heating and Power Company, of Newport, Kentucky, by act approved April 9, 1890: said act having been afterwards, by act approved May 5, 1890, amended so that wherever the word "Edison" appears in said act it shall be struck out, and the word "Suburban" inserted.

Also, a certain franchise, not limited as to time, for furnishing and supplying the city of Dayton, Kentucky, and its inhabitants
262 and other persons and corporations, and municipal corporations, located in or near said city, with light, heat and power by the electric current, granted by the General Assembly of Kentucky to the Citizens' Electric Light Company, of Dayton, Kentucky, by act approved April 17th, 1890.

Also, a certain right of way, not limited as to time, granted to the Suburban Electric Illuminating, Heating and Power Company to use the streets, lanes, alleys and other public thoroughfares, of the city of Newport, Kentucky, for the purpose of thereon erecting poles, laying conduits and maintaining and operating electric light wires and apparatus, for the distribution of electricity for light, heat and power or either, granted by the mayor and board of councilmen of the city of Newport, Kentucky, by ordinance approved June 18, 1890.

Said The Covington Electric Light Company, The Suburban Electric Illuminating, Heating and Power Company, of Newport, Kentucky, and said The Citizens' Electric Light Company, of Dayton, Kentucky, having been consolidated and merged into said The Suburban Electric Company, of Newport, Kentucky, hereinbefore mentioned.

Also, all of the contracts and all of the personal property of every kind and character, including machinery, boilers, pipes, feeders, meters, dynamos, poles, wires, lines, tubes, fixtures, appliances and appurtenances belonging to said The Suburban Electric Company.

263 To have and to hold the same to said The North American Company, its successors and assigns forever, the grantor hereby covenanting with the grantee, its successors and assigns, that the title to conveyed is free, clear and unincumbered, and that it, said The Suburban Electric Company will warrant and defend the same against all legal claims whatsoever, except as to the lien which Caroline B. Smith, Frank E. Smith, her husband, and George M. Casey, or either of them, may have on the real estate situated on Madison avenue, in the city of Covington, Kentucky, above described, which lien, however, is as yet undetermined in amount.

In witness whereof, the said grantor, The Suburban Electric Company, by James C. Ernst, its president, and Charles E. Prior, its sec-

retary, they being thereunto duly authorized, has hereunto signed its name and affixed its corporate seal, this 30th day of April, 1901.

(Signed) THE SUBURBAN ELECTRIC COMPANY,
By JAMES C. ERNST, [SEAL.]
President.

Attest:

(Signed) CHARLES E. PRIOR, *Secretary.*

Witnesses:

(Signed) RICH. P. ERNST.
(Signed) H. W. PERCIVAL.

($20.00 internal revenue stamps cancelled by Suburban Electric Company.)

264 STATE OF KENTUCKY, } *sct:*
County of Kenton, }

I, Harry W. Percival, a notary public, in and for said county and State, do certify that the foregoing instrument of writing from the Suburban Electric Company to the North American Company was this day produced to me by said The Suburban Electric Company, in said county and State, and then and there acknowledged by said The Suburban Electric Company, by James C. Ernst, its president, and Charles E. Prior, its secretary, to be its voluntary act and deed.

Given under my hand and seal of office, this first day of May, 1901.

(Signed) HARRY W. PERCIVAL,
Notary Public, Kenton Co., Ky.

Commission expires January 25th, 1902.

COMMONWEALTH OF KENTUCKY, } *sct:*
Kenton County, }

I, Alex Davezac, clerk of the county court for the county aforesaid, do hereby certify that this instrument of writing from the Suburban Electric Company to the North American Company, was this day presented to me in my office duly stamped as required by act of Congress, certified as above, and left for record at 5.25 o'clock p. m. Whereupon the same and the foregoing and this certificate have been duly recorded in my office.

Given under my hand, this 1st day of May, 1901.

(Signed) ALEX DAVEZAC, *Clerk,*
By EUGENE H. JONAS, *D. C.*

265 STATE OF KENTUCKY, } *sct:*
County of Campbell, }

I, Jos. M. Betz, clerk of the county court in and for the county aforesaid do hereby certify that the foregoing instrument of writing from the Suburban Electric Company, to the North American

Company was, on the 9th day of May, 1901, presented to me in my office certified as above stamped in the sum of $20.00 and lodged for record at 3 o'clock p. m. Whereupon the same the foregoing certificate and this certificate are duly recorded in my office.

Given under my hand this, the 9th day of May, A. D., 1901.

(Signed) JOS. M. BETZ, *Clerk*,
By JOHN MOSPENS, *D. C.*

266 COMPLAINANT'S EXHIBIT "J."

Know all men by these presents: That the North American Company, a corporation duly organized and existing under the laws of the State of New Jersey, in consideration of one dollar ($1.00) and of other good and valuable considerations to it paid by the Union Light, Heat and Power Company, a corporation duly organized and existing under the laws of the Commonwealth of Kentucky, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer and set over unto said The Union Light, Heat and Power Company, its successors and assigns forever, all and singular the following described property, real, personal and mixed, corporeal and incorporeal, and of whatever name or nature, formerly owned by the Covington Gas Light Company, of Covington, Kentucky: the Newport Light Company, of Newport, Kentucky the Suburban Electric Company, of Newport, Kentucky; and all the rights, privileges and franchises formerly belonging to said companies (except the franchise of each of said companies to be a corporation), and more particularly described as follows, to-wit:

All and singular, the property, real, personal and mixed, rights, privileges and franchises formerly belonging to the Covington Gas Light Company, of Covington, Kentucky, and more particularly described as follows, viz:

The following described real estate, to-wit:

All the south half of lot No. two hundred and sixty-four (264) as lald down on the old plan of the city of Covington, Kenton county and State of Kentucky, bounded and described as follows,
267 to-wit: Beginning at a point on the west side of Madison street, ninety-five (95) feet north of the north line of the alley running east and west between Fifth and Sixth (5th and 6th) streets. Said point being the northeast corner of lot No. two hundred and sixty-three (263) on said old plan of said city; thence running westwardly along the north line of said lot No. two hundred and sixty-three (263) one hundred and ninety (190) feet, more or less, to a sixteen (16) feet wide alley; thence northwardly along the east line of said alley, twenty-three (23) feet and nine (9) inches (23 9/12) to a point; thence eastwardly on a line parallel with the north line of said lot No. two hundred and sixty-three (263) one hundred and ninety (190) feet, more or less, to the west line of Madison street; thence southwardly along the west line of said Madison street: twenty-three feet and nine inches (23 9/12 ft.) to the place of be-

ginning; and being the same premises conveyed to said The Covington Gas Light Company by Charles A. McLaughlin and wife, by deed dated April 17, 1869, and recorded in Deed Book No. 20, page 129, Kenton County records. (Covington office.)

Also, all that part of lot No. one hundred and ninety (190) in Foote's second subdivision of lots in the city of Covington, Kenton county, Kentucky, fronting thirty-four (34) feet on the south side of Eighth street, and running through to Saratoga street, and being thirty-four (34) feet on Saratoga street, and lying parallel to and one hundred feet east of Garrard street, and adjoining lot No. one hundred and eighty-nine (189); and being same premises conveyed to said The Covington Gas Light Company by Throdore N. Wise and wife, by deed dated August 6, 1874, and recorded in Deed Book No. 31, page 566, Kenton County records. (Covington
268 office.)

Also, all of lot of ground No. one hundred and ninety-one (191) and the adjoining sixteen (16) feet of lot No. one hundred and ninety (190) in Foote's First addition in the city of Covington, in Kenton county, Kentucky; making together a parcel of ground fronting sixty-six (66) feet on the south side of Eighth street, between Garrard street and Licking river; and from that point extending back southward to Saratoga street; and being the same premises conveyed to said The Covington Gas Light Company by John G. Carlisle *et al.* per master commissioner by deed dated January 8, 1870, and recorded in Deed Book, No. 23, page 283, Kenton County records. (Covington office.)

Also, all that certain tract or parcel of land in the city of Covington, county of Kenton and State of Kentucky, beginning on the south side of Eighth street, two hundred feet eastwardly from Garrard street, and running thence southwardly at right angles, one hundred and twenty-four feet, more or less, to an alley, and extending eastwardly the same width, and bounded by said alley and by Eighth street to low water mark of the Licking river, and being lots Nos. one hundred and ninety-two (192), one hundred and ninety-three (193), one hundred and ninety-four (194) and one hundred and ninety-five (195), as laid down on Kennedy's map of Foote's addition to the city of Covington, Kentucky, and being the same premises conveyed to said The Covington Gas Light Company by John Bradford and wife, by deed dated November 19, 1863, and recorded in Deed Book No. 6, page 321, Kenton County records. (Covington office.)

269 *Also*, all that piece or parcel of ground, lying in the city of Covington, and embraced in the following boundaries; commencing at a point on the southern line of Saratoga street, one hundred feet, from the southeastern corner of Saratoga street and Prospect avenue; thence westwardly one hundred feet with Saratoga street to Prospect avenue, at the intersection of Saratoga street and Prospect avenue; thence with Prospect avenue; thence with Prospect avenue to the intersection of said avenue with Ninth street; thence with Ninth street eastwardly one hundred (100) feet, to the corner of a parcel or lot of ground sold and conveyed by James

Southgate, deceased, by deed of the 24th day of February, 1854, and with the line of said The Covington Gas Light Company, running parallel with Prospect avenue to the beginning; being parts of lots 197, 198, 199 and 200 in Foote's subdivision; and being the same premises conveyed to said The Covington Gas Light Company by James M. Hawes and wife, by deed dated September 16, 1859, and recorded in Deed Book No. 10, page 376, Kenton County records. (Covington office.)

Also, all that piece or parcel of ground lying in said city of Covington, county of Kenton, and State of Kentucky, and embraced in the following boundaries; commencing at a point on the southern line of Saratoga street, one hundred feet from the southeast corner of Saratoga street and Prospect avenue; thence southeastwardly by a line parallel with the eastern line of Prospect avenue to the northern line parallel with the eastern line of Prospect avenue to
270 the northern line of Ninth street; thence with the line of Ninth street eastwardlt to low water mark in the Licking river: thence down the Licking river with the line of low water mark to its intersection with the southern line of Saratoga street; thence westwardly with the southern line to the place of beginning; and being the same premises conveyed to said The Covington Gas Light Company by James Southgate, by deed dated February 24, 1854, and recorded in Deed Book No. 23, page 474, Kenton county records. (Independence office.)

Also, all that square of ground in the city of Covington, county of Kenton and State of Kentucky, bounded by Ninth street on the north; by Tenth street on the south; by Prospect avenue on the west, and by Foote's avenue on the east; said square includes and embraces lots Nos. two hundred and one (201), two hundred and two (202), two hundred and three (203), two hundred and four (204), two hundred and twenty-four (224), two hundred and twenty-five (225), two hundred and twenty-six (226) and two hundred and twenty-seven (227) as laid out on Foote's second subdivision of lots in said city of Covington aforesaid; and being the same premises conveyed to said The Covington Gas Light Company by James C. Blick and wife, by deed dated August 20, 1874, and recorded in Deed Book, No. 31, pages 568 and 569, Kenton county records. (Covington office.)

Also, a certain exclusive franchise for entering in and upon the streets and other public places of the city of Covington, Kentucky, and supplying gas to the inhabitants of said city for a term of twenty years, granted to said The Covington Gas Light Com-
271 pany by the general council and mayor of said city of Covington, as shown by alderman ordinance No. 197, entitled "An ordinance granting to the Covington Gas Light Company, its successors and assigns, the exclusive franchise for the term of twenty years, from the date of the passage hereof, of entering in and upon the streets and other public places of the city of Covington, to lay and maintain pipes for supplying gas and prescribing the conditions thereof;" said ordinances having been passed by the board of aldermen of said general [assembly]* council on November

[* Word enclosed in brackets erased in copy.]

30th, 1900, by the board of councilmen of the said general council, on December 24th, 1900, and approved by the mayor of said city on January 10th, 1901; the validity of which ordinance was affirmed by the court of appeals of Kentucky on February 13th, 1901, in the case of Charles W. Keith, appellant, *vs.* The City of Covington and The Covington Gas Light Company, appellees.

Also, all and singular the property, real and personal, rights, privileges and franchises, formerly belonging to the Newport Light Company, of Newport, Kentucky, and more particularly described as follows, viz:—

The following described real estate, to-wit: All that part of lot twenty-three (23) in Mayo's Orchard addition to the town, now city, of Newport, county of Campbell and State of Kentucky, bounded and described thus: Commencing on the east side of York street at the southerly line of that part of said lot No. twenty-three (23) formerly owned by Henry Worcester, subsequently owned by George Ratcliffe and now owned and occupied by Harry Buchanan;
272 thence parallel with and along the line of York street in the direction of Ringold street, twenty-nine (29) feet to the line of the adjoining lot, formerly known as Barlow's line; thence eastwardly parallel with said Barlow's, now Shaw's line, and at right angles with York street one hundred and ninety—(190) feet to Orchard alley; thence northwardly along the western line of said Orchard alley, twenty-nine (29) feet to the southern line of said Harry Buchanan; thence with the line of said Buchanan, westwardly, one hundred and ninety (190) feet to the place of beginning; being the same premises conveyed to the said The Newport Light Company by Edward W. Lape, *et al.*, by deed dated May 20th, 1889, and recorded in Deed Book No. 49 page 391, Campbell county records.

Also, all that certain tract or parcel of land situate, lying and being in the city of Newport, Campbell county, Kentucky, to-wit: Fronting two hundred (200) feet on the west side of Lowell street, between Elm and Goodman, streets, and binding on each of said streets, and extending back west to the low water mark in the Licking river, three hundred and seventy-five (375) feet, more or less; and being the same premises conveyed to the said The Newport Light Company by the Covington Gas Light Company, by deed dated July 14th, 1883, and recorded in Deed Book No. 34, pages 70 and 71, Campbell county records.

Also, the exclusive privilege and franchise to use any or all of the streets, avenues, alleys, lanes, highways or other public places of the city of Newport, Kentucky, for the purpose of laying pipes to convey and sell gas to the said city of Newport, and its in-
273 habitants, for a term of twenty-five years from June 11th, 1882, and thereafter until said city shall give twelve months notice to terminate the same; said ordinance having been passed by the mayor and board of councilmen of the city of Newport, one June 3rd, 1880; the validity of said ordinance having been affirmed by the court of appeals of the State of Kentucky, in the case of The City of Newport *vs.* The Newport Light Company.

Also, a certain franchise granted by the general council of the city of Newport to the Newport Light Company to erect poles and string wires on certain streets therein named for the purpose of furnishing electric light to said city and its inhabitants; said franchises being subject to revocation at any time by said general council.

Also, all and singular the property, real and personal, rights, privileges and franchises formerly belonging to the Suburban Electric Company of Newport, Kentucky, and more particularly described as follows, viz:—

The following described real estate, to-wit: A parcel of land situated in the city of Covington, county of Kenton, State of Kentucky, beginning at a point in the east line of Madison avenue, at the northeast corner of Madison avenue and an alley running parallel to and between Fourth and Fifth streets; thence northwardly along the east line of said Madison avenue towards Fourth street ninety (90) feet, thence at right angles to Madison avenue, one hundred and ninety (190) feet to another alley; thence with said alley at right angles to the first named alley, ninety (90) feet to the
274 said first named alley; thence westwardly along the same, one hundred and ninety (190) feet, to the place of beginning; subject, however, to such lien as Caroline B. Smith, and Frank E. Smith, her husband, George M. Casey, or either of them, may have upon the same, which lien is as yet undetermined in amount.

Also, the following described real estate, situate in the city of Newport, Campbell county, Kentucky, to-wit; lot No. 260 in "The Cotes Brilliant Lot and Home Company's subdivision," fronting thirty (30) feet on the west side of Park avenue and extending back 120 feet to an alley.

Also, a certain exclusive franchise for a period of twenty-five years from April 22nd, 1882, for furnishing and supplying the city of Covington and its inhabitants and persons and corporations located near said city with light and motive power, generated by electricity, steam or other artificial means, granted by the General Assembly of Kentucky, to the Covington Electric Light Company, by the act approved April 22nd, 1882.

Also, a certain franchise, not limited as to time, for generating, furnishing and selling electricity for light, heat and power, for furnishing and supplying the city of Newport and its inhabitants and other persons and corporations and municipal corporations, located in or near said city, with light, heat and power by the electric current granted by the General Assembly of Kentucky to the Edison Electric Illuminating, Heating and Power Company of Newport, Kentucky, by act approved April 9th, 1900. Said act having been afterwards by act approved May 5th, 1890, amended so that wherever the word "Edison" appears in said act, it shall be
275 struck out and the word "Suburban" inserted.

Also, a certain franchise, not limited as to time, for furnishing and supplying the city of Dayton, Kentucky, and its inhabitants and other persons and corporations and municipal corporations, located in or near said city with light, heat and power, by the electric current, granted by the General Assembly of Kentucky, to the

Citizens' Electric Light Company of Dayton, Kentucky, by act approved April 17th, 1890.

Also, a certain right of way, not limited as to time, granted to the Suburban Electric Illuminating, Heating and Power Company to use the streets, lanes, alleys, and other public thoroughfares, of the city of Newport, Kentucky, for the purpose of thereon erecting poles, laying conduits and maintaining and operating electric light wires and apparatus, for the distribution of electricity for light, heat and power or either, granted by the mayor and board of councilmen of the city of Newport, Kentucky, by ordinance approved June 19, 1890.

Said The Covington Electric Light Company, the Suburban Electric Illuminating, Heating and Power Company, of Newport, Kentucky, and said The Citizens' Electric Light Company of Dayton, Kentucky, having been consolidated and merged into the said The Suburban Electric Company of Newport, Kentucky, hereinbefore mentioned.

Also, all of the contracts, and all of the personal property of every kind and character, including machinery, boilers, furnaces, retorts, gas holders, gas mains, pipes, feeders, meters, dynamos, poles, wires, lines, tubes, fixtures, appliances and appurtenances formerly belonging to said The Covington Gas Light Company, said The
276 Newport Light Company and said The Suburban Electric Company, but which have heretofore been sold, transferred and assigned to said The North American Company: together with all of the gas or electric plants, power houses, stations, supply shops, machine shops, offices, or other structures, with all furniture and appurtenances thereto belonging, located on any of said described properties, and formerly belonging to said companies.

To have and to hold the same, to said The Union Light, Heat and Power Company, its successors and assigns forever, the grantor hereby covenanting with the grantee, its successors and assigns, that the title so conveyed is free, clear and unincumbered, and that it, said The North American Company, will warrant and defend the same against all legal claims whatsoever, except as to the lien which Caroline B. Smith and Frank E. Smith, her husband, and George M. Casey, or either of them, may have on the real estate formerly owned by the Suburban Electric Company, and situated on Madison avenue, in the city of Covington, Kentucky, which lien, however, is as yet undetermined in amount.

In witness whereof, the said grantor The North American Company, by Charles W. Wetmore, its president, and Silas W. Burt, its secretary, they being thereunto duly authorized, has hereunto signed its name and affixed its corporate seal this 27th day of April A. D. 1901

[The North American Company Corporate Seal.]

(Signed) THE NORTH AMERICAN COMPANY,
(Signed) By C. W. WETMORE, *President.*

Attest:
(Signed) SILAS W. BURT, *Secretary.*

277 STATE OF NEW YORK, } ss:
County of New York, }

I, Joseph B. Braman, a commissioner of deeds for the State of Kentucky, in and for said county and State of New York, do hereby certify that the foregoing instrument of writing from The North American Company to The Union Light, Heat and Power Company was this day produced to me by said The North American Company, in said county and State, and then and there acknowledged by said The North American Company, acting by Charles W. Wetmore, its president, and Silas W. Burt, its secretary, to be its voluntary act and deed.

Given under my hand and seal of office this 27th day of April, A. D. 1901.

(Seal of Joseph B. Braman, Commissioner of Deeds for State of Kentucky.)

(Signed) JOSEPH B. BRAMAN,
Commissioner of Deeds for the State of Kentucky within and for the State, City, and County of New York, State of New York.

Office Equitable building, 120 Broadway, New York city.
My commission expires January 8, 1902.
Witness-:
(Signed) ROB'T RANDALL.
(Signed) H. F. KROGER.

($77.00 internal revenue stamps cancelled by the North American Co. April 27th, 1901.)

278 COMMONWEALTH OF KENTUCKY, } sct:
County of Kenton, }

I, Alex. Davezac, clerk of the county court for the county aforesaid, do hereby certify that this instrument of writing from the North American Company to the Union Light, Heat and Power Company was this day presented to me in my office, duly stamped as required by act of Congress, certified as above and left for record at 5.25 o'clock p. m.

Whereupon the same and the foregoing and this certificate have been duly recorded in my office.

Given under my hand this 1st day of May, in the year 1901.

(Signed) ALEX. DAVEZAC, *Clerk*,
By EUGENE H. JONAS, *D. C.*

STATE OF KENTUCKY, } sct:
County of Campbell, }

I, Jos. M. Betz, clerk of the county court in and for the county aforesaid, do hereby certify that the foregoing instrument of writing from the North American Company to the Union Light, Heat & Power Company was, on the 9th day of May, 1901, presented

to me in my office certified as above stamped in the sum of $77.00 and lodged for record at 3.10 o'clock p. m.

Whereupon the same the foregoing certificates and this certificate are duly recorded in my office.

Given under my hand this, the 9th day of May A. D. 1901.

(Signed) JOS. M. BETZ, *Clerk*,
By JOHN MOSPENS, *D. C.*

279 COMPLAINANT'S EXHIBIT "Y."

COVINGTON, KY., *May 1st*, 1882.

The incorporators named in the act of incorporation of the Covington Electric Light Company met and executed the following assignment of their interest in said charter, to-wit:—

We, Horace W. Woodrough, Wm. B. Moore, Jr., and W. H. Glore, incorporators under and by virtue of an act of the General Assembly of Kentucky passed at the session of 1881–2 entitled "An act to incorporate the Covington Electric Light Company, for good, valuable and sufficient consideration, do hereby assign and transfer to James H. Mulligan and R. A. McDannold all the rights, privileges and franchises vested in us as such incorporators under and by virtue of said act.

In witness whereof we hereunto set our hands this first day of May, 1882.

(Signed) HORACE W. WOODROUGH.
WM. B. MOORE, JR.
W. H. GLORE.

And the said Mulligan and McDannold being present accepted same and opened books of subscription to the capital stock of said company, and the following named persons subscribed for the number of shares of stock set opposite their respective names, to-wit:—

T. F. Hallam	24 shares
Harvey Myers	24 shares
J. H. Mulligan	1 share
H. B. Wells	1 share
Alex Davezac	1 share
Total	51 shares

280 And the stockholders thereupon adjourned subject to the call of any stockholder, having elected T. F. Hallam their chairman and Harvey Myers their secretary.

T. F. HALLAM, *Chairman.*

Attest: HARVEY MYERS, *Sec'y.*

MONDAY, *June 2nd*, 1884.

The stockholders of the Covington Electric Light Company met pursuant to call of Messrs. Hallam, Myers and Mulligan. All present.

Two amendments to the charter of the company passed by the General Assembly just adjourned were presented and read to the meeting.

On motion of Mr. Mulligan it was resolved that said amendments be and the same were accepted, to-wit:—

Chapter 1220, an act to amend an act entitled "An act to incorporate the Covington Electric Light Company," approved May 5th, 1884, and

Chapter 1479, "An act to amend the cha-ter of the Covington Electric Light Co." Approved May 10, 1884.

On motion the stockholders adjourned to meet second Monday in January next unless sooner called together by the chairman.

T. F. HALLAM, *Chairman.*

Attest: HARVEY MYERS, *Sec'y.*

281 MONDAY, *January 12th*, 1885.

The stockholders of the Covington Electric Light Company met, all present in person or by proxy.

An election for directors being in order, the following were duly elected: T. F. Hallam, Harvey Myers, J. H. Mulligan, H. B. Wells, Alex Davezac.

The stockholders' meeting then adjourned and the directors met and elected the following officers:

President, T. F. Hallam,

Vice-pres't, J. H. Mulligan,

Treasurer, Harvey Myers,

Thereupon the stockholders' meeting was again called together and the election of said officers was ratified by them unanimously.

It was resolved that the treasurer of the corporation shall also be its secretary and that the minutes of all future meetings shall be signed by the president and attested by the secretary.

On motion the meeting adjourned until the second Monday in January, 1886, unless sooner called together by the president.

T. F. HALLAM, *President.*

Attest: HARVEY MYERS, *Sec'y.*

282 MONDAY, *January* 11, 1886.

The stockholders of the Covington Electric Light Company met and unanimously re-elected the old board of directors and officers, to-wit:—

T. F. Hallam, Harvey Myers, J. H. Mulligan, H. B. Wells, Alex Davezac, directors and

Also elected the following officers:

President, T. F. Hallam,

Vice-president, J. H. Mulligan,

Treasurer & secretary, Harvey Myers.

On motion the board adjourned to meet the second Monday in January, 1887, unless sooner called together by the president.

T. F. HALLAM, *President.*

Attest: HARVEY MYERS, *Sec'y.*

MONDAY, *January 10th*, 1887.

The stockholders of the Covington Electric Light Co., met in regular annual session, President Hallam in the chair and all members present.

Minutes of last meeting read and approved.

The old board of directors were re-elected, to-wit: T. F. Hallam, Harvey Myers, J. H. Mulligan H. B. Wells, Alex Davezac.

283 The following officers were elected:

T. F. Hallam, president.

J. H. Mulligan, vice-president.

Harvey Meyers, sec'y & treasurer.

On motion the board adjourned.

T. F. HALLAM, *President.*

Attest: HARVEY MYERS, *Sec'y.*

MONDAY, *January 9th*, 1888.

The stockholders of the Covington Electric Light Company met in regular annual session, all members present (in person or by proxy).

Minutes of last meeting read and approved.

Following named persons were elected directors:

T. F. Hallam, Harvey Myers, J. H. Mulligan, H. B. Wells, Alex Davezac.

The following were elected officers;

President, T. F. Hallam,

Vice-president, J. H. Mulligan,

Sec'y & treasurer, Harvey Myers.

On motion the meeting adjourned.

T. F. HALLAM, *President.*

Attest: HARVEY MYERS, *Sec'y.*

284 MONDAY, *January 14th*, 1889.

The stockholders of the Covington Electric Light Company met in regular session, all members present.

Minutes of last meeting recorded and approved.

Following named persons were elected directors:

T. F. Hallam, Harvey Myers, J. H. Mulligan, H. B. Wells, Alex Davezac.

The following were elected officers:

President, T. F. Hallam.

Vice-president, J. H. Mulligan.

Sec'y & treasurer, Harvey Myers.

On motion the meeting adjourned.

T. F. HALLAM, *President.*

Attest: HARVEY MYERS, *Sec'y.*

MONDAY, *January 13th*, 1890.

The stockholders of the Covington Electric Light Company, met in regular session, all members present.

Minutes of last meeting recorded and approved.

Following named persons were elected directors:

T. F. Hallam, Harvey Myers, J. H. Mullligan, H. B. Wells, Alex Davezac.

285 The following were elected officers;

President, T. F. Hallam,

Vice-president, J. H. Mulligan,

Secretary & treasurer, Harvey Myers.

On motion the meeting adjourned.

T. F. HALLAM, *President.*

Attest: HARVEY MYERS, *Sec'y.*

COVINGTON, KY., MONDAY, *Jan'y 9th*, 1891.

The regular annual meeting of the stockholders of the Covington Electric Light Company was held, all the stockholders present.

Minutes of the last meeting were read and approved.

T. F. Hallam presented a written transfer and assignment of his stock in this company, to-wit, twenty-four (24) shares to H. Worthington.

J. H. Mulligan transferred and assigned his share of stock in this company to G. G. Hamilton.

H. B. Wells and Alex Davezac transferred and assigned their stock respectively, being one share each, to Alex M. Worthington.

Harvey Myers transferred twenty-three (23) shares of stock to Alex. M. Worthington.

The following resolution was adopted:

Resolved, That the capital stock of this company be and it is hereby fixed at one hundred and fifty thousand dollars ($150,000).

286 Resolved, That subscription books to the capital stock be opened for subscription to 949 shares of the capital stock which, with the 51 shares now issued will make a total of 1000 shares or $100.000.

And thereupon such subscription book was opened and stock subscribed as follows:—

H. Worthington	569	shares
Alex M. Worthington	56	"
G. G. Hamilton	161	"
John R. Coppin	1	"
A. Stuart	162	"

An election for five (5) directors being in order the following named gentlemen were elected receiving the number of votes set opposite their respective names, to-wit:

H. Worthington	626	votes
G. G. Hamilton	651	"
Alex. M. Worthington	765	"
John R. Coppin	1000	"
Harvey Myers	1000	"

An election for officers being in order John R. Coppin was unanimously elected president.

Mr. Geo. G. Hamilton was unanimously elected vice-president and Mr. A. M. Worthington was unanimously elected secretary and treasurer.

287 Harvey Myers resigned as a director and his resignation was accepted. Mr. Myers transferred his share of stock in the company to H. Worthington.

A. Stuart was unanimously elected a director to fill the vacancy. Mr. Stuart declined to serve and his resignation was accepted.

Adjourned to meet February 28th, 1891.

JOHN R. COPPIN, *President.*

A. M. WORTHINGTON, *Sec'y.*

COVINGTON, KY., *February 28th*, 1891.

The stockholders of the Covington Electric Light Company met at the office of the company pursuant to call of the president, who stated the object of the meeting to be the consideration of the question of consolidating with or purchasing the plant of the Citizens' Electric Light and Power Company, and such other business as may come before the meeting.

H. Worthington communicated that he held an option to purchase the entire plant, property, franchises, easements, machinery, rights, poles, lines, bills and accounts and contracts of the Citizens' Electric Light and Power Company and proposed to sell and convey said plant or to assign and transfer said option to this company for the sum of one hundred and forty thousand dollars ($140,000.—,) of which forty thousand dollars ($40,000.) may at the option of this company be paid with its first mortgage bonds at par, said bonds to be five per cent. five-twenty coupon bonds of the denomination of five hundred dollars and properly secured upon the plant of

288 the company by mortgage. And the said H. Worthington further agrees, if this proposition be accepted, to convey by proper deed to this company the real estate whereon the plant of the Citizens' Electric Light and Power Company is now situated.

After a full and free discussion of the subject it was unanimously resolved to accept such proposition, all the stockholders concurring therein and voting all the stock therefor.

Mr. Coppin offered the following resolution which was unanimously adopted, to-wit:

Resolved, That to produce funds sufficient to pay for the plant, etc., of the Citizens' Electric Light and Power Company, an assessment or call of one hundred cents upon the dollar of the outstanding capital stock of this company be and is hereby made, payable on March 4th, 1891, at a meeting of the stockholders to be held that day.

Thereupon Mr. A. M. Worthington offered the following preamble and resolution, to-wit:

Whereas, it has been indicated to the officers of this company that the property, franchises, effects, business, contracts and good will of

the Citizens' Electric Light and Power Company of Covington, Kentucky, could be purchased by this company, and as part of the purchase price, the bonds of this company to the amount of forty thousand dollars, bearing five per cent. interest, payable semi-annually, said bonds payable not later than twenty years after date, or sooner than five years after date, interest and principal in lawful money of the United States, to be secured by a first mortgage
289 upon all the property, franchises, effects, etc., of this company, including that acquired by the said purchase, would be received:

And whereas the officers of this company have agreed with the said Citizens' Electric Light and Power Company of Covington, Kentucky, upon a price for its said property, franchises, effects, business, contracts and good will, and the purchase thereof, which has been submitted to this meeting, and which price includes the said bonds, subject however, to the approval of the stockholders of this company:

Now, therefore, be it resolved:—

First. That the board of directors of this company, be and they are hereby fully authorized and empowered to conclude the purchase of the property, franchises, effects, business, contracts and good will of the Citizens' Electric Light and Power Company of Covington, Kentucky.

Second. That the board of directors of this company, be and they are hereby fully authorized and empowered to issue bonds to the amount of fifty thousand dollars, payable twenty years after date or at the option of the company after five years from date, and bearing five per cent. per annum interest, payable semi-annually, principal and interest in lawful money of the United States: and to secure the payment of said bonds and interest, each and all of them they shall by the president and treasurer and under the corporate seal, duly execute and deliver a deed of trust or mortgage, to a trustee whom they shall elect, conveying all the property, franchise, effects, including those now owned and held by this company, and
290 that which may be acquired by said purchase, with such donations, terms and covenants as they shall see proper, for the purpose of making said purchase and for other purposes of said company.

After full and free discussion the resolution was adopted unanimously.

An election to fill the vacancy in the board of directors being in order, Mr. Harvey Myers was unanimously re-elected.

On motion the meeting adjourned.

JOHN R. COPPIN, *President.*

A. M. WORTHINGTON, *Secretary.*

291 COVINGTON, KY., *March 4th*, 1891.

The stockholders and directors of the Covington Electric Light Company met at the office of the company in Covington, all the directors and all the stockholders present.

Each stockholder paid in the full amount of the assessment or call upon the stock, to-wit:—the full face value thereof, which was, thereupon immediately paid to Henry Worthington according to contract.

A deed of trust or mortgage to the Union Savings Bank and Trust Company of Cincinnati, Ohio, to secure the payment of fifty thousand dollars first mortgage 5-20, five per cent. bonds of this company was presented and read and after several corrections was approved, and the president was ordered to execute and acknowledge and have the same recorded as soon as the bonds shall be ready for execution.

On motion the directors and stockholders adjourned to meet March 5th, 1891.

COVINGTON, KY., *March 5th*, 1891.

The directors and stockholders met pursuant to adjournment, all present.

Mr. H. Worthington, in compliance with his control presented a bill of sale of the Citizens Electric Light & Power Company, duly executed by its vice-president, transferring and conveying unto this company, all and singular its plant, business, machinery,
292 good-will, etc., etc., which was accepted. He also presented his warranty deed conveying, (for a consideration of $12,000) to this company the property whereon said plant, etc., is situate, which deed was accepted and ordered to be left for record.

Mr. Henry Worthington also delivered to this company all the certificates of stock of the Citizens Electric Light & Power Company, being all the capital stock of said company, to-wit, $100,000.

JOHN R. COPPIN, *Pres't.*

A. M. WORTHING, *Sec'y.*

COVINGTON, KY., *March 23rd*, 1891.

A special meeting having been called by the president, the following directors were present, Messrs. Henry Worthington, G. G. Hamilton, John R. Coppin, Hervey Myers and A. M. Worthington.

Minutes of the last meeting read and approved.

The secretary stated the object of the meeting was to freely discuss the subject of public street lighting and to determine which was the best way to proceed to get the contract from the city for all or a portion of same.

293 On motion it was

Resolved, That the president appoint a committee of three to get up a proposition to submit to the honorable board of aldermen and council of the city of Covington, Ky. at their meetings to be held March 31st., and April 1st., 1891, and this committee to submit the proposition and their general report on this subject to this board of directors at a meeting to be held March 27th., 1891. Thereupon the president appointed Harvey Myers, A. M. Worthington and himself as the committee aforesaid.

Upon motion the meeting adjourned.

COVINGTON, KY., *March 27th*, 1891.

A special meeting having been called by the president, the following directors were present: John R. Coppin, and A. M. Worthington. There being no quorum the meeting was adjourned.

294 COVINGTON, KY., *April 2nd*, 1891.

Directors' Meeting.

At a special meeting of the directors having been called by the president at their office, the following direct-s being present, J. R. Coppin, A. M. Worthington, Geo. G. Hamilton and H. Worthington. The object of the meeting was then stated by the president, to be fore the appointment of a committee to prepare by-laws for the government of this company, whereupon H. Worthington made a motion which was duly seconded, that J. R. Coppin, G. G. Hamilton and Harvey Myers be appointed as said committee with instructions to report at their earliest convenience. Which motion was unanimously adopted.

There being no further business, G. G. Hamilton moved that this meeting adjourn. Motion carried.

JOHN R. COPPIN, *Pres't.*

——— ———, *Sec'y.*

COVINGTON, KY., *April 9th*, 1891.

Directors' Meeting.

At a special meeting of the directors of the company, regularly called by its president, the following directors being present, J. R. Coppin, G. G. Hamilton, H. Worthington and Harvey Myers.

295 The president stated that the object of the meeting was to hear the report of the committee on by-laws. The committee made the following report:

By-Laws.

Stockholders' meetings.

First. Stockholders shall meet regularly every year on first Monday in April at their principal office or place of business, and special meetings may be held on call of the board of directors or the president, or the president shall call such meeting on the written request of the majority of the stock. Notices of special meetings shall be mailed to the stockholders and shall specify the time, place and purposes of the meeting. At the annual meetings, the officers shall submit statements of the affairs of the company which shall be referred to a committee to investigate and report on, and *that* said meeting, the stockholders shall elect a board of directors for the ensuing year. Proceedings of stockholders' meetings shall be certified by the chairman and secretary of such meetings and spread on the minutes.

Second.—Directors' meetings.

The board of directors shall hold their regular annual meeting at the principal office of the company in Covington, Ky., on the first Monday in April, of each and every year, and may hold special meetings on the call of the president. Notice of such special meetings to be given by the secretary or treasurer, either by mail or in person.

In the absence of the president or vice-president, any three (3) directors may command the secretary to call a special meeting.

296 In the absence of the president the vice-president shall preside at all meetings. The proceedings of the board of directors shall be regularly kept in a book for that purpose and signed by the presiding officer and secretary.

Third.—Officers.

The officers of the company shall consist of five (5) directors, a president, vice president, secretary and treasurer. One person may be sec'y and treas. The directors shall be elected by the stockholders, either by person or by proxy, each stockholder having one vote for each share of stock to his name on the books of the company. The directors from among themselves elect the president, vice president, and from among themselves or the stockholders or other suitable person, a sec'y & treas., and they may employ such other officers or agents as they deem proper and make regulation for their government.

The sec'y & treas., shall each given bond in the sum of five thousand dollars ($5000.00) with the approval of the board. The directors shall fix the salaries of all officers and employees, and require of them such bond and securities as they may deem proper, and may hire and discharge such at their pleasure, subject only *with* the control of the stockholders. All vacancies in the directors shall be filled by the remaining directors until the next annual elections and the directors shall fill all vacancies in the several offices.

297 Fourth.—Stock.

All persons who have subscribed to stock shall promptly pay all calls on same as made by the board of directors. All certificates of stock shall be signed by the president or vice president, and countersigned by the sec'y, and have affixed the seal of the company.

No certificates shall be issued unless the stock is fully paid up. Stock should be transferrable only on the books of the company and in all cases subject to any debts due from the stockholder to the company.

Fifth.—Amendments.

These by-laws may be altered or amended by a majority vote of all stock issued at any regular or special meeting of stockholders.

On motion of H. Worthington, duly seconded, the fore-going by-laws were unanimously adopted.

There being no further business the meeting was then adjourned.

JOHN R. COPPIN, *Pres.*

—— ——, *Sec'y.*

298 *Stockholders' Meeting.*

COVINGTON, KY., *April 9th*, 1891.

At a meeting of the stockholders this day and date all the stockholders being present, namely, J. R. Coppin, G. G. Hamilton, A. M. Worthington, H. Myers, A. Stuart and H. Worthington. On motion of Harvey Myers, duly seconded, that notices for special meetings of stockholders be and *is* hereby waived. All stockholders being present the motion was carried. Mr. Myers then moved, duly seconded, that the by-laws reported by the board of directors for this meeting of stockholders, being the same as adopted by the board of directors, Resolved.

That the action of the directors therein be and is hereby approved. Motion carried.

There being no further business, on motion, duly seconded, this meeting of stockholders adjourned.

JOHN R. COPPIN, *Pres.*

—— ——, *Sec'y.*

Regular Annual Meeting of Stockholders.

COVINGTON, KY., *April 4th*, 1892.

Held at the principal office of the company. Present—J. R. Coppin, H. Worthington. There being but two (2) stockholders present, the meeting was adjourned to April 11.

JOHN R. COPPIN, *Pres.*

—— ——, *Sec'y.*

299 *Stockholders' Meeting.*

COVINGTON, KY., *April 11th*, 1892.

Met pursuant to adjournment at the principle office of the company.

Present: G. G. Hamilton and H. Worthington.

There being no quorum, the meeting adjourned to meet at same place on April 18th.

JOHN R. COPPIN, *Pres.*

GEO. G. HAMILTON, *Sec'y.*

Directors' Meeting.

COVINGTON, KY., *April 18th*, 1892.

At the adjourned annual meeting of the directors at their office in Covington, Ky., yresent, J. R. Coppin, H. Worthington, G. G. Hamilton, H. Myers.

J. R. Coppin in the chair. Geo. G. Hamilton then presented the resignation of A. M. Worthing as secretary and director, which was accepted. Geo. G. Hamilton was then nominated to take effect fo

lowing the date of A. M. Worthington's resignation, which was duly seconded and Mr. Hamilton was unanimously chosen as secretary. Mr. Coppin then presented the annual statement of the business to date for the benefit of the stockholders, which report
300 was read and ordered spread upon the minutes. There being no further business on motion of H. Worthing, duly seconded, the meeting adjourned.

JOHN R. COPPIN, *Pres.*

GEO. G. HAMILTON, *Sec'y.*

Condition of the Covington Electric Light & Power Co.

Labor	3291.76	
Insurance	226.23	
Salary	1829.78	
Office expense	401.05	
Merchandise	2402.73	
Fuel	5636.80	
Plant expense	906.70	
Hauling	33.63	
Water rent	407.14	
Oil and grease	637.25	
Interest	248.37	
Repairs	501.65	
Taxes	375.05	
Bond coupons	1000.00	
	17898.14	

CR.

By light account	32045.36	
By stock on hand as per inventory	1492.00	
	33537.36	

301 *Resources.*

Betterments	22569.08	
Legal expenses (charter)	507.00	507.00
Building	3551.13	
Cash	221.22	
Bills receivable	13.00	
Covington consumers	1595.79	
Suburban Electric L., H. & P. Co.	1734.96	
Dayton consumers	300.00	
Balance due the Co., in open acc'ts	74.45	
Stock on hand as per inventory	1492.00	
	32058.63	

Liabilities.

Bills payable	11550.00	
Balance due sund. parties on open acc'ts	4869.41	
	16419.41	

Stockholders' Meeting.

COVINGTON, KY., *April 18th*, 1892.

In pursuance to the proceedings of the adjourned meeting held April 11th, 1892, stockholders met at their office in Covington, Ky., all the stock being represented either in person or by proxy amounting in all to 1000 shares.

H. Worthington was appointed chairman and G. G. Hamilton, sec'y. On motion of J. R. Coppin, duly seconded, G. G. Hamilton was elected secretary. The chairman then introduced a statement of the business of the past twelve (12) months which was
302 ordered spread upon the minutes (See page 32) A motion was then made by J. R. Coppin duly seconded, that we now proceed with the election of five (5) directors to *such* until the next annual election and until their successors are elected. Motion carried. The chair then appointed Mr. G. G. Hamilton as teller to prepare the ballots. The election was then held and resulted as follows:

J. R. Coppin	1000
G. G. Hamilton	1000
H. Worthington	1000
H. Myers	1000
A. Stuart	1000

Whereupon the chair declared the above-named gentlemen duly elected. There being no further business on motion of G. G. Hamilton, duly seconded, the meeting adjourned *sine die*.

JOHN R. COPPIN, *Pres't.*

GEO. G. HAMILTON, *Sec'y.*

Directors' Meeting.

COVINGTON, KY., *April 18th*, 1902.

The directors elect, this day, viz. J. R. Coppin, G. G. Hamilton, H. Worthington, A. Stuart, Harvey Myers, met for the purpose of electing officers, whereupon J. R. Coppin, was called to the chair and G. G. Hamilton appointed secretary.

303 J. R. Coppin on motion of H. Worthington, seconded by A. Stuart, was put in nomination for president of the board of directors. On motion of the same parties Mr. G. G. Hamilton was placed in nomination for secretary and treasurer. Motion carried. On motion of A. Stuart, seconded by G. G. Hamilton, H. Worthington was placed in nomination for vice president and duly elected. There being no further business before the board, the president declared the meeting adjourned.

JOHN R. COPPIN, *President.*

GEO. G. HAMILTON, *Secretary.*

Special Meeting of Directors.

Held at their office Covington, Ky., September 1*th*., 1892.

Present: H. Worthington, G. G. Hamilton and Harvey Myers.

A quorum being present, H. Worthington, vice president in the absence of the president was called to the chair, and G. G. Hamilton as secretary.

The chairman stated that the object of the meeting was to take into consideration the subject of the current furnished to the Suburban Electric Light, Heating & Power Co., of Newport, Ky., and the Citizens' Electric Light Co., of Dayton, Ky., as to the compensation now being paid to us by the said companies, since July 1st., 1891, when negotiations were commenced for the consolidation of
304 the three companies, Covington Electric Light Co., and the Newport & Dayton Cos., mentioned above—that said negotiations up to the present time amounted to nothing, they have been delayed and postponed under one excuse and then another on the part of the party representing a majority in interest of the stock of the Newport & Dayton plants, and during all this time, the interest of the stockholders in our Co., have been sacrificed for the benefit and profit of said Newport and Dayton Cos., by reason of inadequate amount received for currents from said companies, and as there seems to be no more prospect of consolidation now than in the beginning, to-wit, July 1st., 1891, I therefore recommend for the consideration of the directors at this meeting that notice be given to said companies that they will be charged on and after October 1st., 1892, such rates as will fairly and fully compensate this Co., for the current furnished as well as such compensation as we are justly entitled to for current furnished since July 1st., 1891 under the pretended promise of consolidation from time to time extended to this Co., thereby inducing this Co., to continue its service of furnishing current until such consolidation could be made.

Mr. Harvey made a motion which was duly seconded that on and after October 1st., 1892, at our pleasure that the Newport & Dayton Cos., be charged the following prices for current, to-wit:—

Arc lights, all night 2000 c. p. each lamp per m'th.....	$6.50
Commercial arc lights to midnight, 2000 c. p. per lmp. per month	6.00
Incandescent 16 c. p. per one ampere meter per month.....	.60

All bills to be paid monthly, that is on the 10th of the
305 month following that for which current was furnished. Motion carried.

There being no further business, on motion duly seconded the meeting adjourned to meet September 28th same place.

H. WORTHINGTON, *V. P.*

GEO. G. HAMILTON, *Sec'y.*

COVINGTON, KY., *September 28th*, 1892.

Adjourned Meeting of Directors.

In pursuance of adjourned meeting held at the office of the company September 16th, 1892 the following directors were present. H. Worthington, Harvey Myers, and G. G. Hamilton. H. Worthington in the chair and G. G. Hamilton sec'y. The minutes of the previous meeting were read and approved. Mr. Worthington then stated that in compliance of the resolution adopted by the directors at their last meeting held Sept. 16th., 1892, that he had caused to be delivered to H. M. Healy, president Suburban Elec. Light, Heating & Power Co., of Newport, Ky., and W. C. McClain, pres't & manager in charge of the Citizens' Elect. Light Co., of Dayton, Ky., and to Paul F. Brady representative of the Central Thompson-Houston Co., of Cincinnati, Ohio, the owners and controllers of the majority of the stock in said Newport and Dayton Companies, a notice as to prices for current supplied to their respective companies on and after Oct. 1st.,
306 1892, the prices therein named being the same as adopted by the directors of this Co., September 16th., 1892.

On motion of Harvey Myers duly seconded, resolved, that the action of the vice president in the premises above referred to be and is hereby ratified and confirmed by this board of directors. On motion duly seconded meeting adjourned.

H. WORTHINGTON, *Chr.*

G. W. G. HAMILTON, *Sec'y.*

COVINGTON, KY., *April 3rd*, 1893.

Regular annual — of the directors of the Covington Electric Light Co., held at their principal office 412 to 418 Madison avenue, Covington, Kentucky.

Present: Harvey Myers, G. G. Hamilton, and H. Worthington, Harvey Myers in the chair and G. G. Hamilton, sec'y. The report of the secretary was then read and approved. It was then moved and duly seconded that the meeting adjourn.

GEO. G. HAMILTON, *Sec'y.*

COVINGTON, KY., *April 3rd*, 1893.

Regular annual meeting of stockholders of the Covington Electric Light Co., held at their principal office 412 to 418 Madison avenue, Covington, Kentucky.

307 Present: Dr. W. A. Bradford, G. G. Hamilton and H. Worthington. Dr. W. A. Bradford in the chair and G. G. Hamilton, sec'y. The secretary's report was then read and approved and ordered to be spread upon the minutes.

There being 830 votes present, Mr. Worthington made a motion to elect a board of five directors and being duly seconded, the following names were put in nomination: Dr. W. A. Bradford, H. Worthington, G. G. Hamilton, A. Stuart and Harvey Myers. G. G. Hamilton was appointed to cast the vote which resulted as follows:—

Dr. W. A. Bradford	830 votes.
H. Worthington	830 votes.
G. G. Hamilton	830 votes.
A. Stuart	830 votes.
Harvey Myers	830 votes.

Dr. W. A. Bradford, H. Worthington, G. G. Hamilton, A. Stuart and Harvey Myers were then declared elected as directors of the company. There being no further business to transact, it was moved and duly seconded that meeting adjourn.

GEO. G. HAMILTON, *Sec'y.*

COVINGTON, KY., *April 3rd*, 1893.

Meeting of directors of the Covington Electric Light Co., held at their principal office 412 to 418 Madison avenue, Covington, Ky.

Present: H. Worthington, Dr. A. W. Bradford, and G. G. Hamilton.

308 On motion of Dr. W. A. Bradford and duly seconded by G. G. Hamilton, H. Worthington was elected president—and on motion of G. G. Hamilton and seconded by H. Worthington, Dr. W. A. Bradford was elected vice-president. On motion made by H. Worthington and duly seconded by W. A. Bradford, G. G. Hamilton was elected secretary and treasurer.

There being no further business, it was moved and duly seconded that meeting adjourn.

GEO. G. HAMILTON, *Sec'y.*
H. WORTHINGTON, *P't.*

COVINGTON, KY., *May 20th*, 1893.

Meeting of directors of the Covington Electric Light Co., held at their principal office, 412–418 Madison avenue, Covington, Ky.

Present: H. Worthington, Dr. W. A. Bradford, G. G. Hamilton and Harvey Myers.

H. Worthington in the chair and G. G. Hamilton, sec'y.

Minutes of the last meeting were read a*b*d approved. Mr. Worthington stated the object of the meeting as to take some co-nisence of suit brought by G. G. Hamilton for receiver of Sub. E. I. H. & P. Co., of Newport, Ky. That the action of G. G. Hamilton in bringing suit for receiver be approved and this company pay the expenses of the same, and further that the action of the president in

309 bringing suit to attach amount of our claim *vs.* Suburban E. I. H. & P. Co., is also approved, which was duly seconded and unanimously carried. Worthington & Company presented their claim for money advanced this company from time to time, and notes paid by them together with interest at 6 % on same, and for the services of H. Worthington for superintending, financeering and running the business up to this date, amounting to $13,485.52, and asked that the same should be paid or settled by note. After some discussion in regard to the time of payment, Dr. W. A. Brad-

ford made the following motion, That the unissued bonds of the existing mortgage on the plant (410,000) face value be offered to Mr. Worthington at 75c. on the dollar in part payment of Worthington & Co., claim, and the balance $5985.52 be paid him with notes of the company at 60, 90 and 120 days, with interest at 6 % from date, said motion being duly seconded,—carried.

Mr. Worthington notified the company that he would accept the above proposition, and that he would agree to return the said bonds to this company at any time within ten days from this date at the same price ($7500.00) and interest, time being essence of this proposition. On motion of Dr. W. A. Bradford, which was duly seconded, resolved, that the action of G. G. Hamilton in bringing suit in the U. S. court for receiver of the Suburban E. I. H. & P. Co., and the suit brought by H. Worthington, president, this company to attach and secure the payment of amount due thus company from the Suburban E. I. H. & P. Co., be approved and that the expense of both suits be paid by this company—carried.

310 There being no further business, it was moved and duly seconded that meeting adjourn.

GEO. G. HAMILTON, *Sec'y.*
H. WORTHINGTON, *P't.*

COVINGTON, KY., *July 6th*, 1893.

At a special meeting of the board of directors called by the president. There were present, H. Worthington, Harvey Myers, Geo. G. Hamilton, and A. Stuart. The object of the meeting was stated by the president, to take action on his resignation as president of the company as he desired to resign that office and request the board to elect a successor at once.

Mr. H. Worthington here offered his resignation, which upon motion duly seconded was accepted.

Upon motion of Mr. Myers, A. Stuart was nominated to fill the vacancy caused by the resignation of Mr. Worthington. There being no other nominations, Mr. A. Stuart was duly elected president of the company for the unexpired term.

A. STUART, *President.*

311 COVINGTON, KY., *August 22nd*, 1893.

At a called meeting of the board of directors held this day, there were present Dr. Bradford, H. Worthington and A. Stuart. The president stated the object of the call was to take action on the resignation of Mr. G. G. Hamilton as director, the election of a successor, also a secretary & treasurer.

The resignation of Mr. Hamilton was presented, and upon motion of Dr. Bradford the same was duly accepted. Mr. Worthington moved that Geo. W. Green be elected a director to fill the vacancy. Mr. Green was therefore unanimously elected. Dr. Bradford moved, same being seconded, that Mr. Green be also elected secretary and treasurer. Motion carried. There being no further business board adjourned.

A. STUART, *Pres't.*

COVINGTON, KY., *Jan'y 8th*, 1894.

Annual meeting of the stockholders of the Covington Elec. Light Co., held at the company's office, Madison street, Cov., Ky.

Present: A. Stuart, Harvey Myers, I. W. Stuart by A. Stuart (husband) proxy, Geo. W. Green.

The president of the company, A. Stuart, called the meeting to order and stated that it was the annual meeting of the stock-
312 holder- provided for in the charter and at which a board of directors for the ensuing year shall be elected.

On motion A. Stuart was chosen chairman and Geo. W. Green sec'y. There was presented to the meeting a statement of its affairs which was referred to a committee consisting of Messrs. Myers and Stuart to examine and report.

On motion the following stockholders were elected directors to serve for the ensuing year, viz:—A. Stuart, Geo. W. Green, F. C. Kemp, Harvey Myers, T. J. Cooney.

On motion the meeting adjourned.

A. STUART, *Chr.*

Meeting of the board of directors of the Covington Electric Light Co., held at the company's office, Covington, Ky., Jan'y 8th, 1894.

Present: A. Stuart, Geo. W. Green, Harvey Myers, F. C. Kemp and T. J. Cooney. On motion A. Stuart was elected president, Harvey Myers was elected vice president and Geo. W. Green was elected secretary and treasurer. The meeting then adjourned to meet at the call of the president.

A. STUART, *Pres't.*

Meeting of the board of directors of the Covington Elec. Light Co., held pursuant to the call of the president at the companies office in Covington, Kentucky, Ap'l 11th, '94.

313 Present: A. Stuart, G. W. Green, Harvey Myers, T. J. Cooney. The minutes of the last meeting *was* approved.

On motion the following resolution was adopted unanimously:

Be it resolved by the board of directors of the Covington Elec. Light Co., That this company accept the provisions of the present or new constitution of the State of Kentucky and that the secretary of this company be directed to file a copy of this resolution in the office of the secretary of state at Frankfort, Ky.

On motion meeting adjourned to call of president.

Meeting of the stockholders of the Covington Elec. Lgt. Co., of Covington, Kentucky, held at the company's office in Covington, Ky., Ap'l 11th, 1894, pursuant to the call of the president.

Present: A. Stuart, Geo. W. Green, Harvey Myers, T. J. Cooney, F. C. Kemp.

A. Stuart was elected chairman and Geo. W. Green sec'y. The chairman presented for the consideration of the meeting articles pro-

viding for the consolidation of this company with the Suburban Electric Illuminating, Heating and Power Company of Newport Ky., and the Citizens Electric Light Co., of Dayton, Ky., under the name of the Suburban Electric Co., which articles were read to the meeting by the secretary and after discussion the following resolution was offered.

314 Resolved, That the plan of consolidation embodied in the articles submitted to this meeting be approved, concurred in and adopted and that the several stockholders execute the same as required by law, and that on behalf of this corporation the president and secretary thereof do execute the same in the name of the corporation. On motion the resolution was adopted by the following vote:

A. Stuart	981	shares,	Yea
Geo. W. Green	1	"	Yea
Harvey Myers	16	"	Yea
T. J. Cooney	1	"	Yea
F. C. Kemp	1	"	Yea

Nays, none.

On motion the meeting adjourned.

A. STUART, *Chr.*

315 United States Circuit Court, Eastern District of Kentucky.

CHAS. H. SHAW, Trustee, etc., Complainant,
vs.
CITY OF COVINGTON ET AL., Respondents. } No. 2212.

Deposition in Behalf of Respondents.

The deposition of Mr. W. H. Mackoy, taken by agreement and without notice, to be read as evidence on behalf of respondents on the trial of this cause, taken on 13th day of December, 1901, at the office of F. J. Hanlon, city solicitor, at the city hall in Covington, Ky., in an action now pending and undetermined in the circuit court of the United States for the eastern district of Ky., wherein Chas. H. Shaw, trustee, etc., is complainant, and The City of Covington *et al.*, respondents, said deposition by agreement of the parties by their attorneys afterward reduced to typewriting, the signature of the said witness thereto being waived by stipulations between the parties by their respective counsel present.

Present: Cassatt and Prior, attorneys representing complainant. F. J. Hanlon, attorney representing respondents.

The said witness: W. H. MACKOY, of lawful age, being first duly sworn deposed and testified as follows, to-wit:—

Direct examination by F. J. HANLON, city solicitor:

Q. Please state your name, age, residence and occupation?

A. W. H. Mackoy, residence Covington, Ky., am a member of the bar, and of legal age, and practicing law for thirty-five years.

Q. 2. I will ask you Mr. Mackoy, if you ever were a member of the city council of Covington, Ky., during the year of 1887, and if so state whether or not you were a member of the committee on law at that time?

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A. I was a member of the city council of Covington, Ky., at the time mentioned. My term of service in said council was 6 years, beginning in January 1883 and ending in January 1889. During the entire time of my service in the city council, I was chairman of the committee on law of that body.

Q. 3. I hand you a copy of a petition from the Covington, Electric Light Company dated June 30, 1887 in which said company asked permission of the city council of Covington for the privilege of doing business in the city of Covington; also a copy of the report of the committee on law on said petition, and will ask you if you remember when said petition was presented, and if you made the report as chairman of the committee on law as embodied in this copy I hand you. If you made said report as chairman on law on September 1st, 1887 upon said petition, please state what investigation you made at the time and why you made said report.

(Objected to as to the competency and relevancy of the form of the question, the reason for the report and the question on which it is based.)

A. 3. I have examined the copy of the petition of the Covington Electric Light Co., as referred to in the question. From an examination of the original petition, a copy of which is referred to in the question, and the report of the committee on law of the Covington city council, annexed to the original petition, I am able to state that a petition came into the Covington city council purporting to be from the Covington Electric Light Company of date June 30th, 1887, is in my handwriting in pencil. At the time the said petition came into the council and at the time *of* the report upon said petition was made by the committee on law, of said council, there were two ordinances in force, or rather one ordinance and an amendment to it, with reference to the lighting of the city of Covington by electricity. The ordinance with reference to that subject was prepared by me mainly from the Cincinnati ordinance, that was then in force, and some amendments were made before it was introduced into the Covington council to make it conform to the needs and requirements of the city of Covington. The amending ordinance, my recollection is, was also prepared by me and both of those ordinances had been adopted by the city council of Covington, and were in force when the said petition, purporting to be from the Covington Electric Light Co. came into the city council.

317

The application or petition of the said electric light company did not conform to the provision of those ordinances and was not accompanied with the bond required by those ordinances. The said application of the said Covington Electric Light Co. was not accompanied either with the name of any officer or person purporting to be connected in any way with the said Covington Electric Light Co., I had no personal knowledge at the time that there was such

a company organized and able to furnish electric light to the city of Covington, and for these reasons, viz: that the application was defective in not having a bond attached to it, and not showing whether there was such organization, and in not having the name of any officer of the said company connected with the application, the committee on law reported against the application, as
318 shown by the copy of the report which is attached to the copy of its petition to council. The petition of the Covington Electric Light Co. came into council some time before the report was made by the committee on law, to which I referred, and no person appeared before the committee on law, to which it was referred, to represent it or to make any offer of a bond, and the committee on law reported against it, for the reasons mentioned.

(Objected to as incompetent and irrelevant.)

And further deponant saith not.

Stipulations.

By agreement of counsel, the respondents offered in evidence the following copies, all of which it was agreed should be attached hereto and marked Exhibits A, B, C, D, & E and that said copies so attached hereto should be used as evidence in the trial of this case, the same as if the original had been introduced, subject to exceptions to the form of introductions being waived.

Said copies are as follows:

A. Certified copy of "An ordinance prescribing the terms upon which streets, alleys, avenues and public grounds of the city of Covington, Ky., may be used by incorporated companies, firms, or individual- engaged in the business of furnishing light by means of electricity." Said ordinance having been passed by the city council of Covington June 21, 1883, and is filed herewith marked Exhibit A.

B. Certified copy of an ordinance passed by the city council of Covington on July 3rd, 1884 entitled "An ordinance to amend an ordinance passed June 21st, 1883 entitled "An ordinance prescribing the terms upon which streets, alleys, avenues and public *public* grounds may be used by incorporated companies, firms, or individ-
319 uals engaged in the business of furnishing light by means of electricity, which copy is filed herewith marked "Exhibit B."

C. Certified copy of a petition from the Covington Electric Light Co., of date June 30th, 1887, asking permission of the city council of Covington for the privilege of doing business in the city of Covington, together with a resolution and report of the committee on laws on said petition of date September 1, 1887. Said copy is filed herewith and marked "Exhibit C."

D. Certified copy of a proposition from the Suburban Electric Co., of date April 1st, 1901, offering to furnish three hundred and forty-three electric lamps to the city of Covington. Said copy is filed herewith as part hereof marked "Exhibit D."

E. Certified copy of the vote cast at the November election 1900 on the $75,000.00 bond issue to build a municipal electric light plant in the city of Covington. Said copy is filed herewith marked "Exhibit E."

STATE OF KENTUCKY, *Kenton County,* } *ss:*

I, R. J. Beimforde, a notary public within and for said county and State do certifiy that the foregoing deposition of W. H. Mackoy was taken before me at the office of F. J. Hanlon, city solicitor, in Covington, Kentucky, on the 13th day of Dec., 1901, in pursuance to agreement; that said witness was first duly cautioned and sworn by me that the evidence he should give in said action should be the truth, the whole truth and nothing but the truth before giving his testimony: that *therefore* the depositions of the said witness was by stipulation between the counsel for the parties taken down in shorthand and reduced to typewriting by an expert stenographer, the signature of the deponent thereto being waived by agree-
320 ment of the parties by their respective counsel present.

I further certify that at the taking of said deposition the complainant was represented by Messrs. Cassatt & Prior, and the respondants were represented by Mr. F. J. Hanlon, city solicitor of the city of Covington.

In testimony whereof, I have hereunto set my hand and seal this 13th day of December, 1901.

R. J. BEIMFORDE,
N. P., K. C., K.

My commission expires June 21st, 1905.

321 The following is a copy of "Exhibit A" referred to in the depositions of W. H. Mackoy in behalf of respondants.

EXHIBIT "A."

"An ordinance prescribing the term upon which streets, alleys, avenues, and public grounds of the city of Covington, Kentucky, may be used — incorporated companies, firms, or individuals, engaged in the business of furnishing light by means of electricity.

SECTION 1.

Be it ordained by the city council of Covington, That any incorporated firm or individual engaged in the business of furnishing light by means of electricity may, with the consent of the owners or lessees *or* of the abutting property, erect and maintain *and* the necessary number of poles, wires, supports, brackets, masts and such other fixtures as may be necessary within said city, subject however to the rules and regulations herein prescribed, and to such other regulations and the rules as the city council of Covingten, may hereafter ordain and prescribe f*i*r the protection of the interests of said city and its inhabitants. The aforesaid permission shall not be

for a longer period than twenty-five years from the date of the grant of same in any case.

SECTION 2.

The poles, wires, supports, brackets, masts, and such that may be erected by any such corporation, firm or individual, other fixtures shall be placed and erected under the direction of the committee on internal improvements of the city council and city engineer, and shall be placed so as not to injure the supports or the work-
322 ing of the lines of any telegraph or telephone, or other like company previously erected on any individual or private property, or in any way injure, obstruct or inconvenience any person in his or her rights to the free use of such streets, alleys, avenues, etc., as public highways; nor shall any pole or other support be so placed as to obstruct or inconvenience any public or private highway or passage way, or so as to injure or obstruct any sewer, water or gas pipe, and unless otherwise directed by said committee on internal improvements the said poles shall be placed under and along the sidewalks, within one foot of the curb line, and such brackets may project from the houses and such supports may be attached to the *oqning* frames, and such lights overhang sidewalks as preferred by the adjoining proprietor, and with the consent of the property owners of said premises all such erections, projections, attachments and overhanging to be under the direction of the said committee on internal improvements and the city engineer.

Provided however that in no case shall the same interfere with the free passage and use of said sidewalk. Said lights may be suspended in mid air and overhanging streets, avenues, alleys, and public grounds, but all said lights as to their erection and suspension, shall be under the control of said committee on internal improvements and the city engineer, and in no case be allowed to obstruct or interfere with *yse* of such street, alleys and avenues as public highways.

SECTION 3.

The rights and privileges granted in the precedings sections may be exercised by an incorporated Co., firm or individual, only in compliance with the following rules or regulations, to-wit:—

323 Capacity of fixtures.

For arc lights, the conductor must have a weight per running foot, at least equal to that of the wire (or parallel group of wires) constituting the main circuit of the magnetic regulator of the electric lamps or of the armature of the machine employed, which ever of them is the largest.

For incandescent lights whenever a connection is made between a larger and smaller conductor, at the entrance or within a building, some approved automatic devise must be introduced in the circuit of the smaller conductor, whereby it shall be interrupted whenever the current, passing through it is in excess of its safe carrying capacity. The safe carrying capacity of the wire is that current

which it will convey without becoming painfully warm when grasped in the closed hand.

Insulation.

All wires machines, and lamps to be so mounted and secured as to insure complete and continuous insulation with exception of those parts (such as portions of the lamps or machines for example) when insulation is impossible, and in this case accidental contact with exterior objects must be prevented by appropriate screens or the like. In no case must ground circuits be employed, or any portion of the system be allowed to come into conducting connections with the earth through water *water* or gas pipes or otherwise. Exposed wires must be covered with at least two coatings, one of insulating material next to the wire of the thickness and material approved by the said committee on internal improvements and the city engineer and another outside of this of a material calculated to protect the former from abraision or other mechanical injury. When there is a pos-
324 sible exposure to water the first or second coating must be impervious to that fluid. Whenever electricity is carried into a building by conductors from an exterior source a cut out must be provided at a point as near as possible to the entrance to such buildings. The out going and returning wires for arc lights shall enter and leave each building at a point at least one foot from each other.

Wires passing through the exterior walls of a building shall be firmly encased in substantial tubes of non-conducting material not liable to absorb moisture and placed in such a manner as to prevent rain water from entering a building along the wires. In running along the walls wires shall be rigidly attached to the same by non conducting fastenings (the wires themselves being well insulated) and shall not be hung from the projecting insulators in loose loops. All wires shall be placed at a distance of eight inches from arc lights and ten and one half inches for incandescent lights from each other and wherever they approach any other wire or other conducting body capable of furnishing another circuit of ground connections they must *ne* rigidly secured and seperated from the same by some continuous solid non-conductor such as dry wood of at least half an inch thickness. Whenever wires are carried through walls floors or partitions in buildings they must be surrounded by a special insulating tube of substantial material.

All joints in wires must be made in such a matter as to a secure perfect and durable contact, contin-ous wires (without joints) to be used as far as possible.

Globes.

Arc lights must be protected by glass globes enclosed at the bot-
tom to prevent the fall of ignited particles; and where inflam-
325 mable materials are present below the lamps, the wire netting must be added to keep the parts of the globe in case of it facture from or during use. All broken or cracked globes to be at once replaced by perfect globes. In show windows and places where inflammable articles are near the lights spark arrestors shall be placed at the top of the globe.

Automatic shut or cut off.

Whenever a current of such high electro motive is employed that if concentrated on one lamp of a series, it might endanger the said lamp or its surroundings, then some approved automatic device must be employed whereby the current shall be modified intercepted, or diverted, means by which those in charge of the dynamo, electric machine, shall be warned of any excessive flow of current or means whereby the same will be automatically checked, must be in all cases provided.

SECTION 4.

Any corporation firm or individual operating under these articles shall be required to adopt *from* any device which may be brought into public use, and which is approved and adopted by the board of fire underwriters *from* the protection of users of electric light against injury to person or property.

SECTION 5.

That the location of any such line or place or the location of any poles wires, supports, brackets, masts or other fixtures shall be changed by said company, and at their own expense, to such other location as may be directed by the said committee on internal improvements; and whenever the best interests of the city and general public may require other and different arrangements by said company using the streets for the purpose of lighting, or other purposes, by means of electrical currents, it shall be the duty of the
326 said company at its own expense to adopt such arrangements as the city council may prescribe.

SECTION 6.

Any corporation firm or individual operating under this ordinance, shall when directed by the city council carry all electric wires through under ground pipes; and where the light is carried to poles, masts, brackets or other fixtures the wires shall be conveying by such tubes or pipes as they (the city council) may require or designate.

SECTION 7.

Any incorporated company firm or individual operating under this ordinance shall, at their own expense and in a manner to be approved by the said committee on internal improvements restore to their former condition any streets, alleys, avenues or public grounds, or squares that may be taken up, excavated or obstructed in any way, by the erection of poles or masts, or the laying of underground pipes; and all such excavating made necessary by the erection of poles or masts or the laying of underground pipes, shall be made under the supervision of and subject to control of the said committee on internal improvements.

SECTION 8.

When any incorporated company, firm or individual shall wish to operate under the provision of this ordinance it or they shall make a written application to the city council stating their desire to operate under this ordinance and the time for which they desire to operate, not exceeding twenty five years: and shall accompany said written application by a bond in the penal sum of twenty thousand dollars with good and sufficient security conditioned to keep
327 and perform all the terms and conditions of this ordinance and to comply with all the rules and regulations herein provided and to save the city harmless from all loss, costs, damage, fees, and expenses of every kind, the said city may sustain or be put to in any manner, or by reason of the grant of the privileges herein provided for, or by reason of the failure of said incorporated Co., to comply with the terms, provisions, conditions, stipulations and regulations of this ordinance or any one or more of them, and if the said council are then satisfied that permission shall be granted to the said incorporated company, firm or individual, and if the bond presented shall be satisfactory to said council, the said council shall approve said bond and shall by ordinance or resolution grant permission to said applicant to operate under the provisions of this ordinance.

SECTION 9.

The non-user for one year of the privilege granted or any abuse of the privileges herein granted either by injury or obstruction to public or private ways or property, or by failure to replace streets or alleys in good repair within a reasonable time, shall operate as a forfeiture of the privileges that may be granted hereunder, to any corporation firms, or individual.

SECTION 10.

Any and all repairs of streets, alleys, highways, or other public property, and all removal or obstructions thereon rendered necessary by the exercise of the privileges herein granted may be made by the city at the expense of the corporation firm or individual, exercising the privileges herein granted.

SECTION 11.

An ordinance passed by the city council October 5, 1882 entitled "An ordinance to enable the Covington Electric Light Co., to
328 exercise the franchise granted by the act of the General Assembly of Kentucky" is now and hereby repealed.

SECTION 12.

This ordinance shall take effect and be in force from and after its passage Passed by the city council June 21, 1883.

I certify that the foregoing writing is a true and correct copy of the original records on file in my office.

J. T. VAN HOENE,
City Clerk,

Per E. B., *D. C.*

329 EXHIBIT "B."

The following is a copy of Exhibit "B" referred to in the depositions of W. H. Mackoy in behalf of respondants.

An ordinance to amend and ordinance passed June 21, 1883, entitled "An ordinance prescribing the terms upon which streets, alleys, avenues and public grounds may be used, by incorporated companies, firms or individual- engaged in the business of furnishing light by means of electricity."

Be it ordained by the city council of Covington, That any incorporated company, firm or individual engaged in business or organized for the purpose of furnishing light by means of electricity, may subject, in all respects, to the provisions, stipulations and conditions of the said ordinance passed by this council June 21, 1883, and entitled An ordinance prescribing the terms upon which streets, alleys, avenues and public grounds of the city of Covington, Ky., may be used by incorporated companies, firms or individuals engaged in the business or furnishing light be means of electricity in addition to the modes in said ordinance provided for furnishing light by means of electricity lay its pipes, mains or other conduits, under the streets, alleys, and public highways of the city of Covington, for the purpose of carrying on its business.

SECTION 2.

The bond to be given by any such company, firm or individual shall be in the sum of $20,000.00 as approved in said original ordinance to which this is an amendment and in addition to the conditions, stipulations and provisions to be contained in said bond,
330 as provided in said original ordinance the said bond shall contain the further conditions that the said company firm or individual accept- the provision- of said ordinance as now amended shall restore to their former conditions and put in good repair at his or their expense any street-, alleys, avenues highways, public grounds, or squares that may be taken up excavated or obstructed in any way by the laying of said pipes, mains, or other conduits under said streets alleys, highways, etc., and that it will pay to the city any damages, cost or expenses said city may incur, sustain or be compelled to pay by reason of taking up excavation or obstruction of any — said streets, alleys, avenues, highways, etc., in the laying of said pipes, mains, or conduits.

SECTION 3.

Any company, firm or individual accepted the provision- of said ordinance as now amended shall not interfere with or damage in

any way, the sewer, gas and water pipes, now laid or that may hereafter be laid in said city, and the work of laying said pipes, mains or concuits, under the streets, alleys, public highways, etc., of the said city by such Co., firm or individuals and the putting of the same in repair, as herein provided by any such company, firm or individual shall be done under the supervision and subject to the directions and approval of the committee on internal improvements of this council and the city engineer of the city of Covington.

SECTION 4.

This ordinance shall take effect and be in force from and after its passage.

Passed by the city council July 3rd, 1884. I certify that the foregoing writing in a true and correct copy of the original records on file in our office.

J. T. VON HOENE, *City Clerk*,
Per E. B., *D. C.*

331 The following is a copy of Exhibit "C" referred to in the deposition of W. H. Mackoy in behalf of respondents.

EXHIBIT "C."

JUNE 30TH, 1887.

To the hon. city council:

The Covington Electric Light Company respectfully petitions your hon. body to grant to it the privilege of doing business in the city of Covington under the provisions of the general ordinance governing electric light Co., upon the execution by it to the entire satisfaction of your committee on law and the city attorney or other proper committee or officer of the bond provided for in the said ordinance, and to that end it respectfully requests the adoption of the attached resolution.

Very respectfully,
THE COVINGTON ELECTRIC LIGHT CO.

Resolved that the Covington Electric Light Company be and it is hereby authorized and empowered to *to* operate and transact business in the city of Covington under the ordinance entitled "An ordinance prescribing the terms upon which streets, alleys, avenues, and public grounds of the city of Covington, Ky., may be used by incorporated companies, firms or individuals engaged in the business of furnishing light by means of electricity passed June 21st, 1883, and the amendment thereto but this resolution shall not take effect until the said company shall execute its bond conditioned according to the satisfaction of the committee on law and city attorney."

332 Referred to the committee on law and gas for report June 30th, 1887.

SEPT. 1ST, 1887.

To the council:

Your committee on law to whom was referred the petition of the Covington Electric Light Co., asking privilege of doing business in the city of Covington under provisions of general ordinance governing electric light companies say that the petition has never been verified by the signature of any officer of said company as required by this council when said petition was presented that there is no evidence before you- committee that said company has ever organized and that no bond has ever been presented as required by the terms of the general ordinance as to electric light companies proposing to do business and they ask to be discharged from further consideration of the petition.

W. H. MACKOY,
Com. on Law.
W. O. RIELLY.
W. BLICK.

Concurred in by board.

I certify that the foregoing is a true and exact copy of the original.

J. T. VON HOENE, *City Clerk,*
Per R. M. RYAN, *Deputy Clerk.*

333 EXHIBIT D.

The following is a copy of Exhibit D, referred to in the depositions of W. H. Mackoy in behalf of the respondents.

To the general council of the city of Covington.

GENTLEMEN: The Suburban Electric Company for itself and for its assigns proposes to furnish the city of Covington three hundred and forty-three (343) arc lamps, or a greater number if desired for its streets, alleys, and public places and incandescent lights for the various public buildings of the city upon the following terms.

First. The city shall contract for not less than three hundred and forty-three (343) series enclosed arc lamps, and supplied with not less than 425 watts of electric power, and having a nominal rating of thousand candle power each.

Second. At least two hundred and fifty of these lamps shall be put in operation during the year 1901 and the balance of the 343 not later than May 1st, 1902.

Third. These lamps are to be of the most improved type and fitted with white reflectors such as are used in all up-to-date cities through Europe and America.

Fourth. We propose to hang these lamps in the middle of the street intersections, except on streets on where by reason of the electric cars there are over-head wires.

On these streets so used by electric street railway- *so* would recom-

mend and furnish ornamental mast arms and bracket suspension from poles.

Fifth. We propose to furnish four iron poles (ornamental) fitted with opal arc lamps for the entrance to the new city building
334 free of charge.

Sixth. We propose to furnish all incandescent lamp renewals for city building free of charge if broken or burned-out lamps are returned to us.

Seventh. We propose to furnish all frosted or colored lamps requested for ornamental purposes in city buildings, free of charge.

Eighth. We will furnish electric fans at cost, and install same free of cost maintaining same in repair and clean and store them during the winter months.

Ninth. The city will be charged seventy-five ($75.00) dollars per year for each series enclosed street lamp maintained by the Co. Said lamps will be kept *lighted every night from sun set to sun rise.*

Tenth. All incandescent lights in the city buildings fan motors, elevator motors, and enclosed arc lamps other than the series street lamps to be charged for on meter basis at the following reduced rates, namely:—ten (10) cents a kilo-watt hour, subject to the following discounts.

Bills over $10.00 not exceeding $20.00	10% discount.
Bills over $20.00 not exceeding $30.00	15% discount.
Bills over $30.00 not exceeding $40.00	20% discount.
Bills over $40.00 not exceeding $50.00	25% discount.
Bills over $50.00	30% discount.

Eleventh. All the various city buildings and their meters to be considered as one installation so that the city may have advantage of the maximum discount.

335 Twelfth. All bills shall be payable monthly.

Thirteenth. The City of Covington, in consideration of this proposition is to take such proceedings in the two suits pending of Shaw trustee *vs.* The City of Covington, in the United States circuit court, as will protect the rights of the Suburban Electric Company as claimed by it during the remainder of the term of its contract with the city of Covington, as now claimed by it and will not grant to any other person or corporation, rights in conflict therewith without the consent of the Suburban Electric Company.

THE SUBURBAN ELECTRIC COMPANY,
By JAS. C. ERNST, *Pres't.*

Covington, Ky., April 1st, 1901.

I certify that the foregoing is a true and exact copy of the original proposition presented to the board of councilmen at a meeting held April 1, 1901 and which was referred to the committee on gas & law.

J T. VON HOENE, *City Clerk,*
Per E. B., *D. C.*

336 EXHIBIT "E."

The following is a copy of Exhibit E, referred to in the depositions of W. H. Mackoy in behalf of respondants.

STATE OF KENTUCKY, } *sct:*
County of Kenton, }

Mr. J. L. Ellison, Henry Kokenge and Wm. Riedlin duly authorized to canvass the returns of the county of Kenton do certify that at an election held in said county on the 6th., day of Nov. 1900—Yes. 2712. No. 1176: Are you in favor of the city of Covington issuing $75,000.00 in bonds for the erection of a city electric light plant to light streets and public buildings?

J. L. ELLISTON.
WM. RIEDLIN.

STATE OF KENTUCKY, } *sct:*
Kenton County, }

I, Alex. Davezac, clerk of the county court within and for the county and State aforesaid the same being a court of record having a seal and having jurisdiction of the probate of wills and the appointment and qualification of executors, administrators, guardians and other fiduciaries do hereby certify that the foregoing and hereto attached writing contain a full and complete copy of the, vote cast at said election upon said question, as fully as the same appears from the records on file in my office.

337 In testimony whereof, I have hereunto subscribed my name at my office in Covington, Kentucky, this 5, day of December, A. D. 1901.

ALEX. DAVEZAC, *Clerk,*
By ALB. DAVEZAC, *D. C.*

UNITED STATES OF AMERICA, } *ss:*
Eastern District of Kentucky, }

I, Jos. C. Finnell, clerk of the United States circuit court, for the sixth judicial circuit and eastern district of Kentucky, at Covington, do hereby certify that the foregoing is a true and complete transcript of the proceedings had in the case set out in the caption hereto, as the same appears from the records and files of this office.

Witness my hand as clerk and the seal of said court, at Covington, this 18th day of November, A. D. 1902, and of our Independence the 127th year.

JOS. C. FINNELL, *Clerk,*
By I. B. SELLERS, *D. C.*

338 And on a day following, to wit: December 13", 1902 an entry was made herein, viz:

Journal I, page 607.

It appearing to the court that the appeal heretofore granted herein to the United States circuit court of appeals has been dismissed by said court upon the motion of appellant for want of jurisdiction and for the purpose of allowing complainants to appeal to the United States Supreme Court at Washington: It is ordered that the injunction heretofore granted herein remain and continue in full force and effect pending said appeal by complainant to the Supreme Court of the United States. To which ruling of the court, defendants except.

And on a day following, to-wit: December 15", 1902 a certified copy of an order of the circuit court of appeals for the sixth circuit was filed herein. Said copy was and is in words and figures as follows, viz:

United States Circuit Court of Appeals for the Sixth Circuit.

CHARLES H. SHAW, Trustee in Bankruptcy of the Suburban Electric Co.,
vs.
THE CITY OF COVINGTON & WILLIAM A. JOHNSON, Mayor of the City of Covington.

In this cause, the motion heretofore entered by the appellant for an order dismissing this appeal for lack of jurisdiction thereof in this court and without prejudice, and for leave to withdraw the record herefrom, came on this day to be heard and was argued by counsel for the appellant in support thereof and by counsel
339 for the appellee in opposition thereto, and upon consideration thereof, it appearing to this court that the said appeal was taken to this court by inadvertance, it is ordered that so much of said motion as prays for leave to dismiss said appeal be granted and the said appeal is therefore now dismissed—and it appearing that the transcript on said appeal has now been filed and the cause docketed in this court, it is further ordered that so much of said motion as prays for leave to withdraw the record from this court be denied.

And it is also further ordered that the motion herein filed by the appellees on the 11th day of December instant, for an order affirming the decree of the circuit court in this cause be denied.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of order of dismissal of Dec. 13" 1902 in the case of Charles H. Shaw, trustee, *vs.* City of Covington, Ky. No. 1165, October term, 1902, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and [SEAL.] affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this 13" day of December, 1902.

FRANK O. LOVELAND,
Clerk of United States Circuit Court of Appeals for the Sixth Circuit.

340 And on a day following, towit: December 19", 1902, a motion was made herein. Said motion is in words and figures as follows, towit:

United States Circuit Court for the Eastern District of Kentucky.

CHARLES H. SHAW, &c., Complainant, *vs.* CITY OF COVINGTON ET AL., Defendants. | Motion to Set Aside Order Continuing Injunction in Force.

Now comes the defendants, City of Covington herein, and moves the court to set aside the order entered herein, on December 13" 1902 continuing the injunction in force and effect, pending the appeal by complainant to the Supreme Court of the United States, and to re-consider same.

F. J. HANLON,
Attorney for Defendants.

And on a day following, towit: December 23" 1902 an entry was made herein. Said entry was in words and figures as follows, towit:

Journal I, page 609.

This cause coming on to be heard upon the motion of defendants by counsel to set aside the order entered herein on December 13", 1902, continuing the injunction in force and effect, pending the appeal by complainant to the Supreme Court of the United States and to re-consider same. Argument was heard and the court now being fully advised, overrules said motion, to which ruling of the court, defendants, by counsel, come and except.

341 And on the same day, towit: December 23" 1902, the following entry was made herein, viz:

Journal I, page 609.

And now, towit: on the 23" day of December, 1902 came complainants and filed a petition for appeal and assignment of errors and prayed an appeal to the Supreme Court of the United States—Whereupon it is ordered that the appeal prayed by the complainants herein be and same is allowed and the appeal bond fixed at $1000.

And now come the complainants and offer bond in the sum of $1000 with the National Surety Company as surety, which is approved.

It is ordered that the injunction heretofore granted herein be continued in force pending the appeal to the Supreme Court of the United States until the final judgment and decree of said court.

The petition for appeal referred to in the foregoing order was and is in words and figures as follows, viz:

United States Circuit Court, Eastern District of Kentucky. In Equity.

CHARLES H. SHAW, Trustee; THE UNION Light, Heat & Power Company, and The Suburban Electric Company, Complainants,
vs.
THE CITY OF COVINGTON and WILLIAM A. Johnson, Mayor of said City of Covington, Defendants.
} Petition for Appeal.

The above named plaintiffs, conceiving themselves aggrieved by the decree made and entered on the 14th day of October, 1902, in the above entitled cause, do hereby appeal from said order
342 and decree to the Supreme Court of the United States at Washington, for the reasons specified in the assignment of errors which is filed herewith, and pray that this appeal may be allowed, and that a transcript of the record proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court at Washington.

FORAKER, OUTCALT, GRANGER & PRIOR,
ERNST, CASSATT, McDOUGALL,
Attorneys for Plaintiffs.

The assignment of errors referred to in the foregoing order was and is in words and figures as follows, viz:—

United States Circuit Court, Eastern District of Kentucky. In Equity.

CHARLES H. SHAW, Trustee; THE UNION LIGHT, HEAT & POWER Company, and The Suburban Electric Company, Complainants,
vs.
THE CITY OF COVINGTON and WILLIAM A. JOHNSON, Mayor of said City of Covington, Defendants.

Assignment of Errors.

Now come the plaintiffs in the above entitled cause, and file their assignment of errors with the petition for appeal herein, and say that the decree in said cause is erroneous and against the just rights of said complainants for the following reasons:

1. The court erred in finding that the exclusive feature of the said franchise of the Covington Electric Company was repealed as of September 28", 1897, by section 573 of the Revised Statutes of Kentucky.

343 2. The court erred in finding that the exclusive feature of the franchise of the Covington Electric Light Company did not pass to the Suburban Electric Company in the consolidation, by which said Suburban Electric Company was formed.

3. Because the attempt of the defendant, The City of Covington, to issue bonds and erect its own municipal electric light plant under and by virtue of the passage of the ordinance in that behalf as set forth in complainant's bill, was and is in violation of section 10, article I of the Constitution of the United States, impairing the obligation of the contract and grant existing between the Commonwealth of Kentucky and the said Suburban Electric Company.

4. The court erred in rendering judgment for the defendants, when judgment should have been rendered for the plaintiffs.

5. Other errors appearing upon the record.

Wherefore, said plaintiffs pray that decree be reversed, and that the said court be directed to enter a decree in accordance with the prayer of the bill.

FORAKER, OUTCALT, GRANGER & PRIOR,
ERNST, CASSATT, McDOUGALL,
Attorneys for Plaintiff.

The bond referred to in the foregoing order was and is in words and figures as follows, towit:—

Know all men by these presents, that we, The Union Heat, Light and Power Company and The Suburban Electric Company & Charles H. Shaw, trustee, as principal and The National Surety Company, as sureties are firmly bound unto The City of Covington and William A. Johnson, mayor of said city of Covington, in the full

344 and *and* just sum of one thousand (1,000) dollars to be paid to the said The City of Covington and William A. Johnson, mayor of said city of Covington, certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23rd day of December in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a session of the United States circuit court for the eastern district of Kentucky at Covington in a suit depending in said court, between Charles H. Shaw, trustee, The Union Light, Heat and Power Company and The Suburban Electric Company, complainants and The City of Covington and William A. Johnson, mayor of said city of Covington, defendants, a judgment was rendered against the said Charles H. Shaw, trustee, The Union Light, Heat and Power Company and The Suburban Electric Company and the said Charles H. Shaw, trustee, The Union Heat Light and Power Company and The Suburban Electric Company having ob-

tained a transcript and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The City of Covington and William A. Johnson, mayor of said city of Covington citing and admonishing them to be and appear at a session of the United States Supreme Court to be holden at the city of Washington, D. C. on the — day of —— next.'

Now, the condition of the above obligation is such, that if the said Charles H. Shaw, trustee, The Union Heat, Light and Power Company and The Suburban Electric Company shall prosecute their appeal to effect, and answer all costs if they fail to make their plea good, then the obligation to be void; else to remain in full force and virtue.

345 THE UNION LIGHT, HEAT & POWER COMPANY,
By ERNST, CASSATT, McDOUGAL,
(*Attorneys.*) [SEAL.]
THE SUBURBAN ELECTRIC COMPANY,
By ERNST, CASSATT, McDOUGAL,
(*Attorneys.*)
NATIONAL SURETY COMPANY.
JOHN T. ROUSE, *Res. Vice President.*
Attest: A. H. SINGER, *Res. Assistant Secretary.*

Sealed and delivered in presence of
JOS. C. FINNELL.

Approved by
A. M. J. COCHRAN,
District Judge.

346 And on a day following, to-wit: on the — day of March A. D. 1903, the following citation issued herein clothed in words and figures following, to-wit:—

United States Supreme Court, City of Washington.

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

To the City of Covington and William A. Johnson, mayor of the city of Covington, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court to be holden at the city of Washington on the second day of April next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Kentucky at Covington, wherein The Union Heat, Light and Power Company is plaintiff in error and you are defendants in error, to show cause if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 3rd day of March in the year of our Lord one thousand nine hundred and three and of the Independence of the United States of America the one hundred and twenty seventh year.

A. M. J. COCHRAN,
U. S. District Judge.

347 And on the same day, to-wit 3 of March, A. D. 1903 the citation issued herein on the 3 day of March A. D. 1903 was returned and filed bearing the following endorsement, viz:—

"Service of within accepted for defendants in error.

F. J. HANLON,
Solicitor for City of Covington."

348 *Certificate.*

UNITED STATES OF AMERICA, *Eastern District of Kentucky,* } ss:

United States Circuit Court, Eastern District of Kentucky.

I, Jos. C. Finnell, clerk of the United States circuit court for the sixth judicial circuit and eastern district of Kentucky, at Covington, do hereby certify that the foregoing 347 pages contain a true and complete transcript of the proceedings had herein, in the matter set out in the caption, as the same appears from the records and files of this office.

Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.

Witness, my hand as clerk and seal of said court at Covington, this 5th day of March A. D. 1903, and of our Independence the 127 year.

JOS. C. FINNELL, *Clerk,*
By J. W. MENZIES, *D. C.*

Endorsed on cover: File No. 18,877. E. Kentucky C. C. U. S. Term No. 649. Charles H. Shaw, trustee; The Union Light, Heat & Power Company & The Suburban Electric Company, appellants, *vs.* The City of Covington and William A. Johnson, mayor of the city of Covington. Filed March 26th, 1903.

349 United States Circuit Court, Eastern District of Kentucky.

CHAS. H. SHAW, Trustee, &c., Appellant,
vs.
CITY OF COVINGTON ET AL., Appellees. } Stipulation.

The clerk herein have omitted to reserve an objection and exception for the defendants to the order of May 16th., 1901, it is now stipulated and agreed by and between the parties hereto that the following order may be entered by the clerk of said court as of said day. aforesaid, and that he may certify this order to the clerk of the Supreme Court of the United States, to be copied and made part of the record upon the appeal herein, in lieu of said order heretofore entered on the 16th., day of May 1901.

Said order which is desired to be corrected is as follows and will be found on pages 23 and 24 of the transcript of the record made out by the clerk herein, to-wit:—

And on the same day to-wit:—on May 16, A. D. 1901, an entry was made upon the journal of this court, clothed in words and figures following to-wit:—

Journal "I," page 106.

On the motion of the Union Light, Heat and Power Co., to be made a party hereto, and for leave to file its bill in the nature of a supplemental bill, all parties having due notice and being in court said motion is granted. Said Union Light, Heat and Power Co. is made a party complainant herein, and leave is granted to file said bill and the same is now filed and the injunction heretofore granted herein is continued in force in behalf of said Union Light, Heat and Power Co., to all of which the defendants, by counsel object and except.

ERNST, CASSATT & McDOUGALL.
OULCALT & FORAKER.

F. J. HANLON,
Att'y for Def'ts.

350 UNITED STATES OF AMERICA, } *ss:*
Eastern District of Kentucky, }

I, Jos. C. Finnell, clerk of the United States circuit court for the sixth judicial circuit and eastern district of Kentucky, at Covington do hereby, certify that the foregoing is a true and correct copy *and* a stipulation filed herein, in the matter set out in the caption hereto as the same appears from the records and files of this office.

Witness my hand and seal of said court this 7th. day of April A. D. 1903. and of our Independence the 127th. year.

JOS. C. FINNELL, *Clerk.*
J. W. MENZIES, *D. C.*

[Endorsed:] United States circuit court eastern district of Kentucky. Chas. H. Shaw trustee &c. *vs.* City of Covington *et al.* Stipulation

351 [Endorsed:] File No. 18,887. Supreme Court U. S. October term, 1902 Term No. 649. Chas. H. Shaw trustee *vs.* City of Covington *et al.* Certified copy of stipulation of counsel for addition to record Filed April 9", 1903

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The Supreme Court of the United States.

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MAY 2 1903
JAMES H. McKENNEY,
Clerk.

CHARLES H. SHAW, Trustee; THE UNION LIGHT, HEAT & POWER COMPANY and THE SUBURBAN ELECTRIC COMPANY,

Appellants,

versus

THE CITY OF COVINGTON et al.,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

Brief for Appellants on the Separate Motions of Appellees to Dismiss and to Affirm.

MILLER OUTCALT,
RICHARD P. ERNST,
ALFRED C. CASSATT,
Attorneys for Appellants.

The Court Index Press, Cincinnati, Ohio.

THE SUPREME COURT OF THE UNITED STATES.

CHARLES H. SHAW, Trustee; THE UNION LIGHT, HEAT & POWER COMPANY and THE SUBURBAN ELECTRIC COMPANY,

Appellants,

vs.

THE CITY OF COVINGTON et al,

Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

Brief for Appellants on the Separate Motions of Appellees to Dismiss and to Affirm.

STATEMENT OF FACTS.

The facts in this case, so far as they bear upon the questions involved in these two motions, are as follows:

On April 22d, 1882, the General Assembly of the State of Kentucky passed an act giving to The Covington Electric Light Company an exclusive franchise to furnish electric light to the City of Covington and its inhabitants for a period of twenty-five years (Record, 126).

Thereafter the company organized and commenced to furnish electric light to the City of Covington and its inhabitants.

On April 5th, 1893, a general corporation act was passed providing for the organization and regulation of corporations. In that act was the following provision (Sec. 573, Ky. Stat.):

> "The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897."

On April 11th, 1894, The Covington Electric Light Company consolidated with The Citizens' Electric Light Company, of Dayton, Kentucky, and The Suburban Electric Illuminating, Heating & Power Company, of Newport, Kentucky, under the name of The Suburban Electric Company. This was done under the authority of Sections 555 *et seq.* of the Kentucky Statutes. Section 556 is as follows:

> "When the agreement is signed, acknowledged and recorded in the same manner as articles of incorporation are required to be, the separate existence of the constituent corporations shall cease, and the consolidated corporations shall become a single corporation in accordance with the said agreement, and subject to all the provisions of this chapter and other laws relating to it, and shall be vested with all the property, business, credits, assets and effects of the constituent corporations without deed or transfer, and shall be bound for all their contracts and liabilities."

This consolidation carried to the new company the exclusive franchise of The Covington Electric Light Company, and the new company carried on in Covington, up to the bringing of this suit, the business of public and private electric lighting, having, among other things, a contract with the City of Covington to light certain streets, alleys and public places of the city. A short time before the beginning of this suit The Suburban Electric Company was adjudged a bankrupt in the United States District Court in the District of Kentucky, and Charles H. Shaw was duly elected and qualified as trustee. The said trustee continued the business of the said Suburban Electric Company, and con-

tinued to furnish light to the City of Covington under the contract then existing between the City of Covington and The Suburban Electric Company and to private consumers in said city.

Some time in the year 1900 the City of Covington conceived the idea of building a municipal lighting plant under the alleged authority of the city charter of Covington, and authorized the issue of bonds for said purpose. Thereupon Charles H. Shaw, trustee of The Suburban Electric Company, filed his bill herein to enjoin said action on the part of the City of Covington. A preliminary injunction was granted. A demurrer to the bill was filed by the defendants, raising the principal questions in the case and the questions upon which the case was afterwards finally decided. Said demurrer, upon full argument, was overruled by Judge Evans.

Thereafter, and before the trial of this cause, the bankruptcy proceedings were terminated and The Suburban Electric Company was restored to its property and franchise. It thereupon transferred this franchise, through an intermediary company, to The Union Light, Heat & Power Company, a corporation under the laws of Kentucky. Thereupon, The Union Light, Heat & Power Company filed its motion for leave to file a bill in the nature of supplemental bill and to become a party complainant, which was granted and the bill filed. Thereafter the evidence was taken and the cause argued and submitted to the court.

Upon an intimation by the court in its first opinion upon submission that The Suburban Electric Company had not the power to transfer its franchise to The Union Light, Heat & Power Company, and that the attempted transfer was therefore ineffective (although the court expressly withheld a decision on that point; Record, page 76, fourth line from bottom), The Suburban Electric Company filed its motion for leave to file bill in the nature of supplemental bill, and to become a party complainant. Its motion was granted, and the bill filed. Thereafter the court entered judgment dismissing the bill of complaint and denying the relief prayed for upon the grounds set forth in its two opinions (Record, pages 42, 77). The decree dismissing the bill was entered on October 14th, 1902. Thereupon, on the

same day an appeal was allowed to the Circuit Court of Appeals. An assignment of errors was filed and a bond approved. The citation was issued and later the transcript was filed in the Circuit Court of Appeals. Thereafter the complainants, being the appellants in the Court of Appeals, became convinced that the Circuit Court of Appeals had no jurisdiction of the case on appeal, and so informed the Circuit Court of Appeals before the argument of the case, and filed their motion in said Circuit Court of Appeals to dismiss their appeal, for lack of jurisdiction thereof in said court, and without prejudice.

Thereupon, the Court of Appeals granted said motion for leave to dismiss the appeal. The order of the Circuit Court of Appeals, a certificate of which was transmitted to and filed in the Circuit Court on December 15, 1902, is as follows (Rec., 190):

> "In this cause, the motion heretofore entered by the appellant for an order dismissing this appeal for lack of jurisdiction thereof in this court and without prejudice, and for leave to withdraw the record herefrom, came on this day to be heard and was argued by counsel for the appellant in support thereof and by counsel for the appellee in opposition thereto, and upon consideration thereof, it appearing to this court that the said appeal was taken to this court by inadvertance, it is ordered that so much of said motion as prays for leave to dismiss said appeal be granted and the said appeal is therefore now dismissed; and it appearing that the transcript on said appeal has now been filed and the cause docketed in this court, it is further ordered that so much of said motion as prays for leave to withdraw the record from this court be denied.
>
> "And it is also further ordered that the motion herein filed by the appellees on the 11th day of December instant, for an order affirming the decree of the Circuit Court in this case be denied."

Thereupon, on December 23d, 1902, the complainants filed in the Circuit Court a petition for appeal and assignment of errors, and prayed an appeal to the Supreme Court of the United States, which appeal was allowed, the appeal bond fixed and given. The assignment of errors appears on pages 192–193 of the record. The transcript on appeal was regularly filed in this court within the time required by law.

The appellees have served upon the appellants printed copies of (1) a motion to dismiss; (2) a separate motion to affirm.

I.

The Motion to Dismiss.

The motion is entitled "Motion to Dismiss Appeal for Want of Jurisdiction." The sole ground of the motion, as therein stated, is as follows:

> "Because the United States Circuit Court for the Eastern District of Kentucky has no power or authority in law to grant an appeal to this honorable court, after granting an appeal to the United States Circuit Court of Appeals for the Sixth Circuit, and said appeal being there dismissed."

The jurisdiction of the court below, and the relief sought, were based on the claim of the complainant that its franchise—a contract between it and the state of Kentucky—was about to be violated by the action of the City of Covington, under the alleged authority of legislation of the state of Kentucky known as the charter of Covington.

The proposed action of the City of Covington was sought to be enjoined on the ground that it was a violation of that clause of the United States Constitution which prohibits a state from passing any law impairing the obligation of a contract. This was the ground, and the sole ground, of Federal jurisdiction in this case. That it is a sufficient ground was held by this court in the following cases:

The New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U. S., 650.
The Louisville Gas Co. v. *The Citizens Gas Co.*, 115 U. S., 683.
The New Orleans Water Works Co. v. *Rivers*, 115 U. S., 674.

That the action of a municipality is, for the purposes of such a question, the action of the state itself, was decided by this court in the case of *The City Railway Company* v. *The Citizens Street Railroad Company*, 166 U. S., 557.

The Circuit Court decided that it had jurisdiction of this case upon the ground above set forth (Record 77).

The court decided against the plaintiff on two grounds: First, that the exclusive feature of the franchise stood repealed by Section 573 of the Kentucky Statutes above quoted, as of September 28, 1897; and, second, that the exclusive feature of the franchise was lost in the consolidation proceedings in which The Covington Electric Light Company became merged with The Citizens Electric Light Company and The Suburban Electric, Illuminating, Heating & Power Company. The court having decided against the plaintiff upon the question in the case, viz., the impairment of the obligation of the contract, the plaintiff had a right to appeal to this court.

The appellate jurisdiction of this court in such a case is exclusive.

This has been recently decided, in a similar case, by the Circuit Court of Appeals of the Sixth Circuit, of which the state of Kentucky is a part.

> *The City of Owensboro* v. *The Owensboro Water Works Co.*, 115 Fed., 318.

It has been decided by this court in numerous cases, one of the most recent being the case of *The Huguely Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S., 290, where the court says:

> "If the jurisdiction of the circuit court rests solely on the ground that the suit arises under the Constitution, laws or treaties of the United States, then the jurisdiction of this court is exclusive."

It is unnecessary to cite further authorities to show that this court has jurisdiction to hear this case upon appeal, and that such jurisdiction is exclusive, for the reason that the principle is well settled, and for the further reason that appellees admit in their brief on this case (page 4) that the Circuit Court of Appeals had no jurisdiction to hear this case on appeal.

The appeal, therefore, which was taken to the Circuit Court of Appeals, was a nullity from beginning to end, and did not deprive the Judge of the Circuit Court of the power to grant an appeal to this court, nor deprive the appellants of the right to an appeal to this court.

This exact question was decided by the Supreme Court of Louisiana in the case of *McWilliams* v. *Michel et al*, 43 La. Ann., 984. The syllabus of that case is as follows:

> "When an appellant applies for and obtains an order of appeal to a court having no jurisdiction of the matter in dispute, the order is a nullity. He is not estopped from presenting his appeal in a court of competent jurisdiction."

The same question has been, in effect, passed upon by this court in the case of *The Excelsior Wooden Pipe Co.* v. *The Pacific Bridge Co.*, 185 U. S., page 282. In that case the court below had dismissed a bill on the ground that the court was without jurisdiction to hear the case. Thereupon plaintiff appealed to the Circuit Court of Appeals, which dismissed the case upon the ground that it had no jurisdiction over the appeal, which should have been taken to the Supreme Court. Thereupon the mandate of the Circuit Court of Appeals having been filed in the Circuit Court, another appeal was taken from the Circuit Court directly to this court.

This court proceeded to hear the case on appeal, and reversed the judgment of the Circuit Court, thus upholding its appellate jurisdiction, even though a void appeal had first been taken to the Circuit Court of Appeals.

Even if the first appeal is a valid appeal, nevertheless, if it be withdrawn by appellant before a hearing, the right to a new appeal is not prejudiced.

In the case of *Ward* v. *Hollins*, 14 Maryland, 158, the syllabus is as follows:

> "If an appeal be prayed and allowed, and then withdrawn by the appellant's order, he is not thereby precluded from afterwards prosecuting an appeal in the same case, providing it is done within the time limited by law."

The authorities cited by counsel for the appellees are cases in which a valid appeal was taken and was pending in the appellate court, and where, in spite of this fact, some effort was made to take action in the court below while the valid appeal was still pending. They are none of them authority for the proposition

that the power of the court to grant an appeal is exhausted when an appeal is allowed, but not prosecuted to judgment. This court has held in numerous cases that where an appeal is dismissed in this court, on some other ground than the merits, another appeal may be taken to this court unless, of course, this court should hold, in dismissing the appeal, that it had no authority to entertain any appeal in the case in question.

In the case of the *Steamer Virginia* v. *West*, 19 Howard, 182, the court, by Chief-Justice Taney, said :

> "The transcript must be filed in this court, and the case docketed at the term next succeeding the appeal, in order to give this court jurisdiction. This case must therefore be dismissed.
>
> "But the dismissal does not bar the appellant from taking and prosecuting another appeal at any time within five years from the date of the decree, provided the transcript is filed herein and the case docketed at the term next succeeding the date of such second appeal."

In the case of *Evans* v. *State Bank*, 134 U. S., page 330, the court, by Mr. Chief-Justice Fuller, used the following language :

> "A motion is now made to dismiss the appeal, upon the grounds that it could not be granted, because the court had exhausted its power by the allowance of the first appeal, and because, if this were not so, the second appeal was not taken within two years from the entry of the decree. As to the first of these grounds, it may be remarked that when the term elapsed at which the first appeal was returnable, without the filing of the record, that appeal had spent its force, and the matter was open to the taking of a second appeal, as it would have been if appellee had docketed the cause and had it dismissed."

See, also, to the same effect :

Yeaton v. *Lenox*, 8 Peters, 123.
U. S. v. *Curry*, 6 Howard, 110, 113.
United States v. *Depacheco*, 20 Howard, 261.

The cases above quoted and cited are, we think, an answer to the proposition of appellees that the court had exhausted its power by the allowance of the appeal to the Circuit Court of Appeals.

There have been cases in the Federal courts where, in view of a doubt on the part of counsel as to the proper appellate tribunal, appeals have been allowed to two courts, and both allowed to stand until it was authoritatively decided which court had appellate jurisdiction.

In *Pullman Palace Car Company* v. *Central Transportation Company*, 76 Fed., 401, the appellant having taken an appeal to this court, and being in doubt whether this court or the Circuit Court of Appeals had jurisdiction, took a second appeal to the Circuit Court of Appeals. The latter court declined to dismiss the appeal, pending the decision of this court. In this court (171 U. S., 145) Mr. Justice Peckham, referring to the ground on which the appeal had been taken here, said :

> "There being room for doubt in regard to the soundness of such contention, counsel also took an appeal to the Circuit Court of Appeals, and we think that, by this action, he did not waive any right of appeal which he would otherwise have had."

II.

The Motion to Affirm.

We think we have shown that there is not even a color of right to a dismissal in this case. That being true, the court will not consider the motion to affirm.

Whitney v. *Cook*, 99 U. S., 607.
Davies v. *Corbin*, 113 U. S., 687.

Aside from the application of this rule, we think it will be seen that the motion to affirm in this case ought not to be entertained. Under the rule of this court, the motion to affirm must be on the ground that it is manifest that the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

At the time that this suit was brought, the plaintiff was in the possession of an exclusive franchise granted by the state, acquiesced in by the municipality, and exercised by its owner for a period of ten years. Large sums of money had been invested

upon the faith of the franchise. The corporation paid a franchise tax upon it to the City of Covington, and the City of Covington had entered into a contract with the company to light its streets, alleys and public places.

When the suit was entered a demurrer was filed to the bill, which raised exactly the questions upon which the case was finally decided on the merits. After a full hearing, Judge Evans, who heard the demurrer, overruled the same and sustained the contention of the complainant. Afterward, in the hearing upon the merits, Judge Cochran took a different view of the case from Judge Evans and sustained the contention of the City of Covington.

At the outset, therefore, the claim of appellees that this appeal is for purposes of delay, or frivolous, is met by the fact that two Judges of the Circuit Court have reached directly opposite views upon the questions in controversy in this case.

As further indicating that there is a real controversy in this case, we call the court's attention to the fact that upon the hearing upon the merits, the decision of Judge Cochran covers thirty-five pages of the printed record; that the court did not enter judgment upon rendering the original opinion, but allowed the the case to rest from June 17th, 1902, to October 2d, 1902, to give complainant an opportunity to make an oral argument on the rehearing, and on said rehearing filed a written opinion which covers five pages of the printed record.

Moreover in the final decree in the case finding against the contention of the complainant, the court nevertheless continued the injunction in force pending an appeal.

All this indicates that in the opinion of the Judge who decided the case against us, the questions at issue are serious, and are questions upon which we are entitled to have the judgment of this court before the *status quo* should be disturbed.

These are the external signs of the important, serious and real character of the questions involved in this case.

An examination of the questions themselves will lead to the same result. The court below held that The Covington Electric Light Company obtained a valid exclusive franchise from the state of Kentucky. That such exclusive franchise was not re-

pugnant, when obtained, to any provisions of the laws or the Constitution of Kentucky.

Louisville Gas Co. v. *Citizens Gas Co.*, 115 U. S., 683.

The court further held that prior to April 11th, 1894, when the consolidation took place between The Covington Electric Light Company and the other two companies heretofore mentioned, The Covington Electric Light Company was still in full, complete and rightful possession of said exclusive franchise.

But the court was of opinion that the consolidation of the three companies, while it carried into the consolidated company the franchise of The Covington Electric Light Company to supply electric light to the City of Covington and its inhabitants, did not carry with it the exclusive feature of said franchise.

We claim and we confidently expect to show to this court upon the hearing upon the merits, that this exclusive franchise was an entirety ; that it was property, and that under Section 556 of the Kentucky Statutes, heretofore quoted, it passed by the consolidation to the new company.

Philadelphia & Wilmington R. R. Co. v. *Maryland*, 10 Howard, 376.
New Orleans Gas Co. v. *the Louisiana Light Co.*, 115 U. S., 650.

The court further held that, whatever the effect of the consolidation, the exclusive feature of this franchise (though not the remainder thereof) was repealed by Section 573 of the Kentucky Statutes, heretofore quoted, but which we quote again at this point as it is a novel piece of legislation :

> "The provisions of all charters and articles of incorporation, whether granted by special act of the General Asssembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897."

These were the points, and the only points, upon which the court decided the case against the plaintiff (Record, page 81).

We claim that Section 573 only relates to such matters as are within the purview of the chapter in question and embraced within its general purposes, viz., matters of the organization and the powers of a corporation, the powers of its officers and the rights and liabilities of its directors and stockholders, but that it does not relate to such a property right as an electric franchise.

We have said enough to indicate to the court the serious character of the questions involved in this case, and to demonstrate that this appeal is not frivolous nor for purposes of delay. On the contrary, we think it is apparent that both of the motions filed in this case are entirely without foundation and based upon an utter misconception of the rules of this court.

All of which is respectfully submitted.

MILLER OUTCALT,
RICHARD P. ERNST,
ALFRED C. CASSATT,
Attorneys for Appellants.

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JAMES H. McKENN

No. 246

U. S. SUPREME COURT

CHARLES H. SHAW, Trustee, et al.,
Appellants,

vs.

THE CITY OF COVINGTON et al.,
Appellees.

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTION OF APPELLEES TO ADVANCE.

MILLER OUTCALT,
RICHARD P. ERNST,
ALFRED C. CASSATT,
Attorneys for Appellants.

22728

UNITED STATES SUPREME COURT.

CHARLES H. SHAW, TRUSTEE, et al.,
Appellants,
vs.
THE CITY OF COVINGTON et al.,
Appellees.
No. 649.

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTION OF APPELLEES TO ADVANCE.

The appellees have filed a motion in this case that it be advanced for hearing. After setting forth in a general way the nature of the action, and the questions involved, counsel for appellees says:

"The reasons for this application are: That the matters involved herein are of great public interest to the State of Kentucky, and the citizens and taxpayers thereof. It is important to all municipalities in the State of Kentucky, and the citizens and taxpayers thereof, and to all private corpora-

tions, that the law as to exclusive franchises and privileges in Kentucky should be speedily settled.

Wherefore the appellees, City of Covington, and William A. Johnson, Mayor, pray that this cause be advanced and heard at as early a date as may be convenient and proper under the rules of court. The injunction is still in force and effect, preventing appellee city from issuing bonds and constructing said municipal electric light plant."

The language just quoted is the only language in the motion which purports or attempts to state a reason why the cause should be advanced.

There are no facts alleged which show that the matters involved in this action are of great public interest to the State of Kentucky. So far as this record, including the motion, show, there are no other exclusive franchises in the State of Kentucky, and there are no allegations of fact showing that the law as to exclusive franchises in Kentucky requires a settlement, speedy or otherwise.

The fact that the injunction is still in force preventing the appellee from issuing bonds and constructing a municipal light plant, thus violating the terms of the franchise claimed by the appellants, is not, as we understand the matter, a recognized ground for advancing the cause. It does not appear that the enforcement of this injunction is any hardship to the city of Covington, or that it is suffering financial or other loss thereby.

Under Rule 26 of this Court it is provided that the following classes of cases may be advanced: criminal cases, cases once adjudicated and again brought up, and revenue and other cases in which the United States are concerned, which also involve some matter of general public interest. Section 7 of said rule provides as follows:

"No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the Court."

We submit that in this case there have been no special or peculiar circumstances shown to the Court which require the advancement of the case.

All of which is respectfully submitted.

MILLER OUTCALT,
RICHARD P. ERNST,
ALFRED C. CASSATT,
Attorneys for Appellants.

No. [illegible] 246

Supreme Court of the United States.

CHARLES H. SHAW, Trustee; THE UNION LIGHT, HEAT & POWER COMPANY, and THE SUBURBAN ELECTRIC COMPANY,

Appellants,

versus

CITY OF COVINGTON et al,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

Brief for Appellants.

MILLER OUTCALT,
RICHARD P. ERNST,
ALFRED C. CASSATT,
Attorneys for Appellants.

THE COURT INDEX PRESS, Law Printers, 806 Main Street, Cincinnati, Ohio.

SUPREME COURT OF THE UNITED STATES.

CHARLES H. SHAW, Trustee; THE UNION LIGHT, HEAT & POWER COMPANY, and THE SUBURBAN ELECTRIC COMPANY,

Appellants,

No. 649. *vs.*

CITY OF COVINGTON et al,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

Brief for Appellants.

This is an appeal from the decree of the Circuit Court of the United States for the Eastern District of Kentucky in an action in which the appellants were complainants and the appellees were defendants, and in which the court dismissed the bill and denied the relief sought.

The action was brought in the Circuit Court by Charles H. Shaw, Trustee in Bankruptcy of The Suburban Electric Company, claiming the ownership of an exclusive electric light franchise in the City of Covington, Kentucky, to enjoin said city from constructing a municipal lighting plant. The ground

upon which the injunction was sought, was that the construction and operation of such a plant would be a violation of the exclusive franchise aforesaid, and, therefore, an impairment of the obligations of a contract in contravention of Article I, Section 10 of the Constitution of the United States.

STATEMENT OF FACTS.

On April 22, 1882, the General Assembly of the State of Kentucky passed an act giving to the Covington Electric Light Company an exclusive franchise to furnish electric light to the City of Covington and its inhabitants for a period of twenty-five years. That act and two amendments thereto are hereto attached, marked Appendix A.

The company was promptly organized; officers were elected and regular meetings were held every year up to the year 1891, when the company commenced to furnish electric light in the City of Covington.

On October 5, 1882, the City of Covington passed an ordinance entitled "An ordinance to enable the Covington Electric Light Company to exercise the franchises granted by the act of the General Assembly of Kentucky." This ordinance is set out in full as Appendix B of this brief.

On June 21, 1883, the ordinance last referred to was repealed by an ordinance entitled as follows: "An Ordinance prescribing the terms upon which streets, alleys, avenues and public grounds of the City of Covington, Kentucky, may be used by incorporated companies, firms or individuals engaged in the business of furnishing light by means of electricity." This ordinance purported to state the terms upon which any company, firm or individual could acquire a franchise in the City of Covington, and to enumerate the steps which must be taken by any company, firm or individual which sought a franchise *under the terms of that ordinance*. This ordinance is attached hereto in full, marked Appendix C.

On July 3, 1884, an ordinance was passed by the Common Council of Covington amending the ordinance last named. A copy of the amending ordinance is hereto attached, marked Appendix D. It does not contain any provisions which bear directly upon the points in controversy in this contention.

Some time between the years 1885 and 1890 a company had been organized, either as a corporation or a partnership, to carry on an electric lighting business in the City of Covington, and without any direct authority either from the city or state had erected poles, strung wires, and constructed an electric plant. This company had developed a considerable business in the latter part of the year 1890, and in January, 1891, the Covington Electric Company acquired the plant and assets of this company, and with its poles, wires and plant commenced an electric lighting business in the City of Covington. It notified the city council of Covington that it had made said purchase, and requested council to authorize the transfer to the Covington Electric Light Company of all the franchises of the other company. Thereupon council responded that the other company had never acquired a franchise and that there was nothing to transfer. The Covington Electric Light Company, finding there was no franchise belonging to the other company, accepted the situation and proceeded to act under its own franchise. It immediately commenced the transaction of a considerable business in the City of Covington in the month of January, 1891, and from month to month and from year to year thereafter increased its business, adding largely to its plant, the length of its lines, the amount of light furnished and the investment involved.

On April 11, 1894, the Covington Electric Light Company, the Citizens Electric Light Company, of Dayton, Kentucky, and the Suburban Electric Illuminating, Heating and Power Company of Newport, Kentucky, consolidated under the provisions of Section 555 *et seq.* of the Revised Statutes of Kentucky, under the name of the Suburban Electric Company. This consolidation carried to the new company the exclusive franchise of the Covington Electric Light Company, and the new company carried on in Covington, up to the time of the bringing of this suit, the business of public and private electric lighting, steadily increasing its plant and its investment in the City of Covington.

In the year 1897, the City of Covington had under consideration a contract with the Suburban Electric Company by which the latter company was to light the streets, alleys and public places of the City of Covington. The city council as a preliminary step to entering into this contract decided to inves-

tigate the validity of the Suburban Electric Company's franchise in the City of Covington, and referred the matter to a committee and to the city solicitor. That committee and the city solicitor reported that the Covington Electric Company had received a valid franchise in 1882, had commenced to operate under it prior to the consolidation, and that the Suburban Electric Company had at that time, in 1897, all of the franchise rights of the Covington Electric Company as given to it by its legislative charter. This report was concurred in unanimously by the city council and upon the basis of this report a contract was entered into between the City of Covington and the Surburban Electric Company. A copy of the report of the committee is hereto attached, marked Appendix E. The contractual relation thus established has continued until the present day. During all of that time the City of Covington has been supplied with light for its public streets and has paid for same. The company has regularly paid franchise taxes to the City of Covington upon its franchise.

At the time of the filing of this suit, the Suburban Electric Company had gone into bankruptcy, but after the filing of the suit the bankruptcy proceedings were terminated and the company restored to its property and franchises. It thereupon conveyed this franchise to the Union Light, Heat & Power Company, which was then made a party complainant herein by bill in the nature of supplemental bill.

Some questions having been made upon argument in this case in the court below as to the assignability of this franchise by the Suburban Electric Company, that company was made a party complainant hereto, and filed its bill in the nature of a supplemental bill, as appears of record herein, page 82.

This bill was filed upon the motion of the Suburban Electric Company, and by order of Court, all of which was done before the decree was entered in the case. No answer was ever filed to the supplemental bill.

Some time in the year 1900, the City of Covington conceived the idea of building a municipal lighting plant, and proceeded to authorize the issue of bonds for that purpose. The complainant herein, claiming that such an action upon the part of the City of Covington would be a violation of its exclusive fran-

chise, filed its bill to enjoin such action on the part of the City of Covington.

QUESTIONS INVOLVED.

It is not denied by the city that under the terms of our charter we were given an exclusive franchise in the City of Covington to furnish light to the city and its inhabitants, and that the present attempt upon the part of the City of Covington to erect and operate its own lighting plant is in violation of the terms of our exclusive franchise.

The grounds upon which the city denies our right to the relief sought are as follows:

I. That we were guilty of a non-user for a period of five years, and therefore lost our franchise.

Our answer to this is that if there was a non-user within the meaning of our charter, it did not work an automatic forfeiture; that, at best, it was merely a ground of forfeiture; that the State was the only party that could have taken advantage of it, and not having done so, no forfeiture ever occurred.

II. That the company failed to give a bond required by the ordinance of June 21, 1883.

Our answer to this is that the ordinance in question did not apply to our company; furthermore, that even if it had applied to our company, the failure of the company to give the bond would not be even a ground of forfeiture, much less the foundation for the claim that our franchise had been destroyed.

III. That by the consolidation of the Covington Electric Light Company with the other companies under the name of the Suburban Electric Company it lost its exclusive franchise.

Our answer to this is that the statute specifically provides that in the event of such a consolidation, the new company shall become the owner of all the rights and franchises of the constituent companies.

IV. That our franchise was repealed by the passage of the Covington City Charter.

Our answer to this is that the Covington City Charter did not purport to repeal any provision of the franchise in question. It simply authorized the Covington Council "to provide by themselves, or through others, for lighting the streets, etc., and to furnish light to the inhabitants."

V. That our exclusive franchise was repealed by Section 573 of the Revised Statutes of Kentucky, which provides for the repeal as of September, 1897, of all special charters inconsistent with the chapter of which said section is a part.

Our answer to this contention is that there is nothing in our charter which is inconsistent with that chapter; that the provisions of the Constitution and statutes indicate clearly that Section 573 was not intended to destroy an exclusive franchise which, in consideration of public service and the performance of a public duty delegated by the State, had been lawfully granted to and enjoyed by a private corporation. Furthermore, that the General Assembly was without power to destroy such franchise even if it had so intended.

VI. That the exclusive franchise in question was not assignable by the Suburban Electric Company to the Union Light, Heat & Power Company.

Our answer to this is that, under the terms of the franchise and the law of Kentucky, it was assignable, but that the question is immaterial because the Suburban Electric Company is itself a party complainant.

The mere statement of this fact will render unnecessary any discussion of the assignability of the franchise in question.

The opinion is to be found at length on pages 42, *et seq.*, of the printed record.

The court below decided the first, second and fourth points in our favor, holding that we had acquired a valid exclusive franchise which was not forfeited by a non-user, or by a failure to give bond to the City of Covington, as stated, and that it was not repealed by the passage of the Covington City Charter.

ERRORS ASSIGNED.

The court held with the city, however, on the third and fifth points, and decided that the exclusive franchise was lost in the consolidation of the Suburban Electric Company with the other companies, and that irrespective of that, it was repealed as of September 28th, 1897, by Section 573 of the Revised Statutes of Kentucky.

ARGUMENT.

Before proceeding to the discussion of these questions, as above stated, we desire to advance the following propositions relative to the nature of the franchise in question.

Complainants' franchise is from the State of Kentucky and not from the municipality and was valid when granted.

It was proper for the State to grant to a private corporation the exclusive right to furnish electric light for public and private consumption in the City of Covington. Such a grant is not a violation of any provision of the Constitution of Kentucky as it then existed, or as it now exists. Such grants have always been regarded as legal and as proper. In the case of

New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U. S., 650,

the complainant company had an exclusive franchise to furnish gas to the City of New Orleans. This franchise was attacked, and this court in deciding the case held as follows:

> Syl.: "A legislative grant of an exclusive right to supply gas to a municipality and its inhabitants, through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee, is a grant of a franchise vested in the State, in consideration of the performance of a public service, and, after performance by the grantee is a contract protected by the Constitution of the United States against State legislation to impair it."

Mr. Justice Harlan, speaking for this court at page 665, says:

> "If the state can, by contract, restrict the exercise of her power to construct and maintain highways, bridges and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation by granting exemption from taxation to particular individuals and corporations; it is difficult to perceive upon what ground we can deny her authority—when not forbidden by her own organic law—in consideration

> of money to be expended and important services to be rendered for the promotion of the public comfort, the public health, or the public safety, to grant a franchise, to be exercised exclusively by those who thus do for the public what the state might undertake to perform either herself or by subordinate municipal agencies."

See also to the same effect, the case of

New Orleans Water Works Co. v. *Rivers*, 115 U. S., 674.

In the case of

Louisville Gas Co. v. *Citizens' Gas Co.*, 115 U. S., 683,

this court again lays down the rule stated in the New Orleans case above quoted, and also makes this additional ruling upon the general subject (see Syllabus, p. 683):

> "A legislative grant of an exclusive right to supply gas to a municipality and its inhabitants by means of pipes and mains laid through the public streets, and upon condition of the performance of the service by the grantee, is no infringement of that clause in the Bill of Rights of Kentucky, which declares 'that all freemen, when they form a special compact, are equal and that no man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services.'"

The cases above cited are conclusive, we think, upon the validity of an exclusive franchise of this character.

We desire to further impress upon the court that this franchise was given directly by the State of Kentucky, and not by the City of Covington. The State of Kentucky had the power to grant the franchise, and did grant it to the Covington Electric Light Company; and the City of Covington had no further control over, or connection with, the franchise than was expressly given it in the charter of the company. We state this proposition at this time, so that, in considering the various points in this case, it shall not be confused with that class of cases in which the franchise proceeds directly from a municipality and remains directly under its control. Under such a franchise as the one now in question, the only power which the city has is to impose certain regulations as to the

manner of laying pipes, erecting poles, stringing wires, etc. It can not augment or diminish in any respect the franchise itself. See

Chicago City Ry. Co. v. *People,* 73 Ills., 541.

In the case of *Africa* v. *The Mayor, etc.,* 70 Fed., 729, p. 733, the court says:

> "It is to be borne in mind that plaintiff's franchise to operate his railroad is not derived from the municipal corporation, but from the Legislature itself, and it is none the less so because obtained under a general incorporation act, instead of a special statute, which is no longer constitutionally possible. * * *
>
> "The only authority delegated to the city in the completion of the franchise rights, is the power to give its consent and to prescribe the terms and conditions on which the streets are to be used. * * *
>
> "The statute does not reserve to the city council the right to repeal. So far as such right is reserved at all, it is reserved to the Legislature itself. The statute does not vest the city with any power whatever to grant or repeal a grant. Its power over the subject ends when it gives its consent and prescribes the conditions in an ordinance for that purpose. Whether the city council might withhold its consent altogether in the first instance is a point upon which the cases are not agreed and is not necessary to be considered here. When it has given its consent it has excepted and exhausted its power, so far as the right to use the streets is concerned."

THE COURT BELOW HAD JURISDICTION TO ENTERTAIN THIS ACTION.

This is a case arising under the Constitution of the United States, particularly that clause thereof which forbids the enactment of laws impairing the obligation of contracts.

That such an exclusive privilege is a contract coming under the protection of the Constitution of the United States, has been definitely settled in three cases heretofore referred to, viz.:

Louisville Gas Company v. *Citizens' Gas Company,* 115 U. S., 683.

New Orleans Gas Company v. *Louisiana Light Company,* 115 U. S., 650.

New Orleans Water Works Company v. *Rivers,* 115 U. S., 674.

While it is true that in the case at bar we are not attacking any action by the State of Kentucky itself, nevertheless the proposed action of the City of Covington is based upon a supposed right given by the act of the General Assembly, known as the Covington City Charter; and the clause of the United States Constitution heretofore referred to applies equally to the acts of the state or acts by municipalities under the cover of authority of state laws. The principle is thoroughly recognized in the case of *The City Railway Company* v. *The Citizens' Railroad Company*, 166 U. S., 657. The court says, on pages 563 and 564:

> "All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair. Conceding that the Legislature of the state alone had the right to make such grant, it may, as was observed in *Wright* v. *Nagle*, 101 U. S., 791, 794, 'exercise its authority by direct legislation, or through agencies duly established, having power for that purpose. The grant, when made, binds the public, and is directly or indirectly the act of the state. The easement is a legislative grant, whether made directly by the Legislature itself or by any one of its properly constituted instrumentalities.' 'The complainants claim,' as in the case under consideration, 'they have such a grant through the agency of the inferior court, acting under the authority of the Legislature.' See, also, *Saginaw Gas Light Co.* v. *Saginaw City*, 28 Fed. Rep., 529; *Weston* v. *Charleston*, 2 Pet., 462; *New Orleans Water Works Company* v. *Rivers*, 115 U. S., 674.
>
> "That the complainant had a contract with the city is entirely clear. It was so held by the Supreme Court of Indiana in the *Western Paving & Supply Company* v. *Citizens' Street Railroad Company*, 128 Indiana, 525, in which the liability of the company for certain street improvements was discussed and passed upon. It is true that, by Section 11 of the original act of 1861, a right was reserved to the general assembly to amend or repeal at their discretion the act authorizing the incorporation of street railway companies; but that was a right reserved to the general assembly itself and was never delegated, if in fact it could be delegated, to the common council of the city.
>
> "That the city did attempt to impair this contract by the agreement of April 24, 1893, with the City Railway Company, and its ordinance ratifying the same,

is equally clear. This contract was entered into in pursuance of a supposed right given by the act of the General Assembly of March 6, 1891, known as the city charter, the fifty-ninth section of which was enacted that 'the board of public works shall have power * * * to authorize and empower by contract, telephone, telegraph, electric light, gas, water, steam, or street car or railroad companies to use any street, alley or other public place in such city: * * * provided, that such contracts shall, in all cases, be submitted by said board to the council of such city, and approved by them by ordinance before the same shall take effect.' This contract and ordinance of April 24, 1893, even if otherwise valid, could not be construed to interfere with the rights of the complainant to occupy the streets of the city under the act of 1861, and the ordinance of January 18, 1864, without coming in conflict with that provision of the Constitution which forbids states from enacting laws impairing the obligation of contracts. Whether the state had or had not impaired the obligation of this contract was not a question which could be properly passed upon, on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith, and was not a frivolous one. *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S., 79, 88."

A very full and strong decision to the same effect is that of Judge Taft, speaking for the Circuit Court of Appeals of this circuit, in the case of *The Iron Mountain R. Co. of Memphis* v. *City of Memphis et al.*, 96 Federal, 113, to which the court's attention is invited.

We now proceed to the argument of the questions involved herein, as heretofore enumerated:

I.

The franchise was not forfeited by reason of the non-user for a period of five years.

The evidence shows that the Covington Electric Light Company promptly organized after its charter was granted in 1882, and maintained an organization, with officers, directors and regular meetings, from the time of the incorporation until its consolidation with the other companies in the Suburban Electric Company.

The language of the charter upon which the defendant relies in its claim that our charter has been forfeited is as follows:

> "But a non-user of the privilege of this act of incorporation for a period of five years shall work a forfeiture."

We claim, in the first place, that the forfeiture referred to related not merely to the franchise upon the streets of Covington, but also to the right to exist as a corporation; in other words, that it covered the entire grant made by the charter. This being true, the non-user which was to work a forfeiture must have been equally extensive, and must have related to all the things to be done by the company under its charter. If, therefore, the company did anything under its charter within five years, such as a *bona fidē* organization, an election of directors and officers—all of which it did—this would save it from the guilt or the penalty of the non-user referred to.

In the second place, even if the forfeiture and the non-user referred only to the exclusive privilege of furnishing electric light to the City of Covington and its inhabitants, nevertheless the failure of the company to commence furnishing light within the five years did not of itself produce an automatic forfeiture. Such non-user would at best be a mere ground of forfeiture to be asserted by the state in a direct proceeding, and this not having been done, the forfeiture is waived and the franchise is in full force and effect.

In the third place, grounds of forfeiture or any violation of our duties under the charter can not be asserted collaterally or incidentally in a proceeding of this character. The only competent evidence in an action of this sort is the judgment of a court in a direct proceeding by the state against our company, declaring the forfeiture of our franchise. No such action having been taken, and no such judgment having been entered, the city can not rely upon any alleged violations of our charter as grounds of forfeiture.

We will argue these propositions in the inverse order stated.

(a). Non-user can not be set up collaterally or incidentally as in this case.

The law on this subject is very clearly stated in Angell and Ames on Corporations, Section 777, to be as follows:

"A cause of forfeiture can not be taken advantage of or enforced against a corporation collaterally or incidentally or in any other mode than by a direct proceeding for that purpose against the corporation, so that it may have an opportunity to answer. And the government creating the corporation can alone institute such a proceeding, since it may waive a broken condition and a compact made with it as well as an individual."

In the treatise of Clark and Marshall on Private Corporations, Vol. 2, Section 313*a*, the principle is again stated in another form:

"When it is said that a corporation may forfeit its charter by mis-user or non-user of its franchise, it is not meant that the mis-user or non-user results *ipso facto* in its dissolution. On the contrary, as a general rule, however long a corporation may fail to exercise the powers conferred upon it, or however much it may abuse them, a forfeiture of its charter can only take effect upon a judgment of a competent tribunal in judicial proceedings instituted by authority of the state. The state may waive the forfeiture, and until it institutes proceedings to have a forfeiture judicially determined and declared, and a judgment or decree of forfeiture is rendered, the existence of the corporation continues for all purposes just as if there had been no mis-user or non-user; and the forfeiture can not be set up collaterally by private individuals or other corporations, or even by the state for the purpose of attacking the right of the corporation to exercise the powers and franchises conferred upon it by its franchise."

This principle is so fortified by uniform authority, that it would seem unnecessary to either argue it at length, or cite authorities, save and except to remind the court of the opinion of Mr. Justice Nelson in the case of *Frost et al* v. *The Frostburg Coal Company*, 24 Howard, p. 278, on p. 283:

"The ninth section of the charter provides that the corporation shall be subject to all the restrictions imposed by the general act of 1838, regulating incorporations for manufacturing and mining companies. The fifteenth section of this act provides, that when over four-fifths of the capital stock of the company to which the act applies shall become concentrated, by purchase

or otherwise, in the hands of less than five persons, etc., all the corporate powers and privileges granted shall cease and determine. And it is insisted, that the stock of this company, at the time of its organization was held in violation of this section of the general act. Although the ninth section of the charter subjected the company to the general act, yet the provision is to be construed as subject only, when not inconsistent with the express provisions of the charter; and in this view, the better opinion, we think, is, that this four-fifths provision does not apply. But whether it does or not, it is unimportant to determine; for conceding that it does, a private party can not take advantage of the forfeiture. That is a question for the sovereign powers, which may waive it, or enforce it, at its pleasure. (9 Wend. 382; 4 Denio, 397)."

(b). Non-user for five years did not automatically produce a forfeiture without proceedings for that purpose.

As we have seen, the language of our charter is as follows:

> "But a non-user of the privilege of this act of incorporation for a period of five years shall work a forfeiture."

It can not be claimed that, under the language above set forth, the failure of the Covington Electric Light Company to erect poles and string wires for a period of five years resulted *ipso facto* in the forfeiture of its franchise without any judicial proceedings.

The Legislature may, in granting a franchise provide that it shall cease to exist if the grantee shall fail to comply with the prescribed condition, but to make such a failure result *ipso facto* in a forfeiture, the act must clearly show such an intention on the part of the Legislature. Otherwise, the failure of a corporation to comply with a condition subsequent, imposed by its charter, is merely a cause of forfeiture in appropriate proceedings on behalf of the state brought directly for that purpose, and can not be set up collaterally by private individuals, other corporations, or by the state.

It certainly can not be contended that the language of the charter of the Covington Electric Light Company exhibited a clear intention upon the part of the Legislature that a non-user should *ipso facto* produce a forfeiture. The word "for-

feiture" implies a legal process, and wherever it has been used alone, either in the form of a verb or a noun, it has been regarded as referring to judicial proceedings or their result, and not to the automatic cessation of the right or rights of the corporation. It may be useful in this connection to call the attention of the court to the various cases in which this question has arisen, where the report of the case shows the language of the charter construed by the court.

In the case of

Lumber Co. v. *Ward*, 30 W. Va., 43,

the language of the act was "shall forfeit its charter." The court held that this language was not self executing.

In the case of

Vermont, etc., Ry. v. *Vermont Ry.*, 34 Ver., 1, pp. 55-57,

the language of the charter was, "This corporation shall cease and this act be void." The court held that this language was not self-executing; and in so deciding said the following:

> "A forfeiture of a corporation can only be taken in behalf of the public and in some form of proceedings to which the public by proper representation is the party moving it, and in which, by competent authority, such forfeiture is declared."

In the case of

The City Council v. *Railway Co.*, 51 S. Car., 129,

the language was, "All rights, powers, franchises and immunities shall cease, determine and be void." The court held that this language was not self executing.

In re Manhattan Co., 9 Wendell, 349,

the language of the charter was, "In default whereof said corporation shall be dissolved." This was held not self executing.

In the case of

In re Kings County Elevated Ry., 105 N. Y., pp. 97-119,

the grant provided for "the release and forfeiture of all rights," etc. The court held this not to be self executing.

In the case of

Day v. *Railway*, 107 N. Y., 129, 139,

the language of the charter was, "Said corporation shall be dissolved." The language was held to be not self executing.

In the case of

The Brooklyn Elevated Railway Co., 125 N. Y., 434,

the language of the charter was, "On default, shall forfeit the rights acquired by it." This was held not self executing.

In the case of

New York & Long Island Bridge Co. v. *Smith*, 148 N. Y., 540,

the language of the charter was, "shall be null and void." The court held this language to be not self executing.

In the case of

Enfield Toll Bridge Co. v. *Conn. Ry. Co.*, 7 Conn., 28, 51,

the language of the charter was "null and void," just as in the preceding case. This was held not self executing.

In the case of

Attorney-General v. *Superior, etc., Ry.*, 93 Wis., 604,

the language of the charter was, "shall be deemed to have surrendered" and "shall be adjudged to be dissolved." This language was held not self executing.

In the case of

Foster v. *Joliet*, 27 Fed., 899,

the language of the charter was "shall cease and determine." This was held not self executing.

In the case of

Briggs v. *Cape Cod Canal Co.*, 137 Mass., 71,

the language of the charter was, "this corporation shall thereupon cease to exist." The court held this language to be not self executing, and in so deciding said as follows:

> "It is too well settled to admit of discussion that a corporation can be judicially determined to have ceased to exist only in a suit in which the commonwealth is a party. The act of incorporation is a contract between the commonwealth and the corporation. Whether

the corporation has complied with the conditions is a question of fact to be judicially determined. The commonwealth may waive a strict compliance, etc."

In the case of

Willamette Falls Co. v. *Kittredge,* Fed. Case No. 17105,

the language of the charter was, "corporate powers shall cease." This language was held to be not self executing.

In the case of

State v. *New Hampshire Turnpike Co.,* 15 New Hamp., 162,

the language of the charter is, "under forfeiture of the privilege, etc." This was held to be not self executing.

In the case of

People v. *Los Angeles Ry. Co.,* 91 Cal., 338,

the language of the charter was, "A failure to comply with these provisions *works a forfeiture.*" This was held to be not self executing.

In the case of

Lessee of Frost v. *Frostburg Co.,* 24 How., 278,

the language of the charter was "shall cease and determine," and this court held this language to be not self executing.

II.

The fact that the bond was not given does not affect the franchise of complainant.

It is claimed by the City of Covington that the failure of the Covington Electric Light Company to give a bond under the Covington ordinance of June 21, 1883, is in some way fatal to the franchise which is asserted in this action. We can not understand the basis of such a contention. No authorities have been cited, showing a decision by any court that a valid franchise, granted by the state, may become forfeited by the mere failure of the grantee to give a bond required by municipal authorities.

The act incorporating the Covington Electric Light Company, and granting it the franchise in question, did not require

the company to give a bond. Such a requirement was not a part of the contract between the company and the state, and was not a condition precedent, or a condition subsequent, to the vesting of the rights given by the act of incorporation.

Neither was the City of Covington empowered in said act in express terms to require from the Covington Electric Light Company a twenty thousand dollar bond, or any bond.

The sixth section of the act of incorporation is the only section containing any language which apparently gives any control to the City of Covington, and is as follows:

> "Said company shall have the privilege, *subject to the regulations of the city authorities*, to lay its pipes and mains, to erect its poles, posts and wires, through and along any street or highway in the city aforesaid, or adjacent thereto, as it may see fit; provided, it in no way permanently obstructs the use of the same to the public or any individual; and it is hereby required to place and put in repair any street or highway through which its line of pipes, wires, etc., may pass; but it is allowed to temporarily obstruct for a reasonable time in laying its line and repairing the same."

The only language in the act of incorporation, therefore, giving any power to the City of Covington, is the language, "subject to the regulations of the city authorities;" and this regulation refers to the manner of the exercise by the company of its privilege to lay pipes and mains, erect poles, posts, etc., on the streets or highways of the city.

On October 5, 1882, less than six months after the granting of the franchise, the City of Covington passed an ordinance "to enable" the Covington Electric Light Company to exercise the franchises granted by the act of the General Assembly. This ordinance contained no requirement for the giving of a bond. The ordinance remained in force until it was repealed by the general ordinance of June 21, 1883. This latter ordinance, which is printed with this brief as "Appendix C," purported to give to any incorporated company, firm or individual, the franchise to enter in and upon the streets and public places of the City of Covington, and erect poles and string wires for the purpose of furnishing the city and its inhabitants with electric light. It did not purport to state the regulations under which the Covington Electric Light Company might exercise the

franchise granted by the state. It provided for the granting of franchises by the city, and, as we claim, had no relation whatever to any pre-existing franchises granted by the state itself. Among its provisions was section 8, which provided for the giving of a bond. Said section is as follows:

> "Whenever any incorporated company, firm or individual, shall wish to operate *under the provisions of this ordinance*, it, or they, shall make a written application to the city council, *stating their desire to operate under this ordinance, and the time for which they desire to operate, not exceeding twenty-five years;* and shall accompany said written application by a bond in the penal sum of twenty thousand dollars, with good and sufficient security, conditioned to keep and perform all the terms and conditions of this ordinance, and to comply with all the rules and regulations herein provided, and to save the city harmless from all loss, costs, damages, fees and expenses, of every kind, the said city may sustain or be put to, in any manner, *by reason of the grant of the privileges herein provided for*, or by reason of the failure of said incorporated company to comply with the terms, provisions, conditions, stipulations and regulations of this ordinance, or any one or more of them, and, if the said council are then satisfied that permission shall be granted to said incorporated company, firm or individual, and if the bond presented shall be satisfactory to said council, the said council shall approve said bond, and shall, by ordinance or resolution, *grant permission to said applicant to operate under the provisions of this ordinance.*"

The ordinance of June 21, 1883, was amended July 3, 1884, section 2 of the amended ordinance being as follows:

> "2. The bond to be given by any such company, firm or individual shall be in the sum of $20,000, as provided in said original ordinance, to which this is an amendment, and in addition to these conditions, stipulations and provisions to be contained in said bond, as provided in said original ordinance, the said bond shall contain the further conditions that the said company, firm or individual accepting the provisions of said ordinance as now amended, shall restore to their former conditions and put in repair at his or their expense any streets, alleys, avenues, highways, public grounds or squares that may be taken up, excavated or obstructed, in any way, by the laying of said pipes, mains

or other conduits under said streets, alleys, avenues, etc., and that it will pay to the city all damages, costs or expenses said city may sustain, incur or be compelled to pay by reason of taking up, excavating or obstructing any such streets, alleys, avenues, highways, etc., in the laying of said pipes, mains or conduits."

We have thus given a brief statement of the provisions of the act, and of the various ordinances under which the city is now claiming a forfeiture of our franchise, as a result of our failure to give bond. We think this contention of the city is unfounded for the following reasons:

1. The act of incorporation of the Covington Electric Light Company did not provide for any *permission* or *consent* to be given by the City of Covington; the state gave to the company the permission and the consent to enter in and upon the streets of Covington, and the City of Covington had not the power to deny or prevent the exercise of the right, or to abridge its exercise. Furthermore, the franchise of the Covington Electric Light Company was not by virtue of any grant or permission or consent of the City of Covington, no matter what action the city might take. The right of the company proceeded from the state by a legislative charter, and became vested in the company irrespective of any action which the city might take.

The only power which the city had was to regulate the manner of using the streets for the location of pipes, poles, wires, etc. We doubt very much whether the city had the power, under the act of the General Assembly, to require a bond of the Covington Electric Light Company, even if it had done so. The terms of the franchise itself provided the extent to which the company might obstruct the streets, and it stated the requirement as to placing and putting in repair any street or highway. That subject having been covered by the act of incorporation, we think it is clear that the City of Covington had no power to impose any different or additional restrictions upon the exercise of the right, and had no power to require from the company the giving of a bond to secure the performance of the conditions of either the legislative act itself or of any ordinance passed by the City of Covington.

2. The City of Covington did pass an ordinance setting forth the regulations under which the Covington Electric Light

Company could exercise its franchise. It is to be borne in mind that such action upon the part of the City of Covington was not a condition precedent to the vesting of the franchise rights. The act did not provide for any consent or permission to be given by the City of Covington, but only for the imposition of reasonable regulations by the City of Covington. If, therefore, the City of Covington failed to impose regulations on this company, or if, having imposed any such regulations, it rescinded or withdrew them, the company was not thereby deprived of its right to go on the streets of the City of Covington. If the city imposed no regulations, or withdrew any which it had imposed, the company was free to act untrammeled by any regulations, except those contained in the articles of incorporation.

The ordinance which was passed by the city on October 5, 1882, contained no provision requiring the company to give a bond. The only regulations that it imposed were with reference to the obstruction of the streets and their repair. This ordinance was never amended so as to include a provision with reference to a bond. The ordinance was repealed on June 21, 1883, by another ordinance, which did not refer to or include the franchise of the Covington Electric Light Company, and did not purport to state any regulations under which its franchise should be exercised.

We submit, therefore, that the only regulations which the City of Covington ever imposed upon the Covington Electric Light Company were repealed, and these regulations did not include a requirement for bond. The company was, therefore, left untrammeled and unrestricted, save by the terms of the legislative act creating it, in its exercise of the power to go upon the streets of Covington. The City of Covington did recognize its rights, and did impose certain regulations, which were afterwards repealed, but the city had, by the ordinance of October 5th, recognized the franchise of the Covington Electric Light Company, and it could not, by a repeal of the ordinance in question, deprive the company of the right to go upon the streets of Covington. That right upon the part of the company did not require the consent of the City of Covington; but, if it had, the city could not have withdrawn the consent, when once given. (See *Africa* v. *The Mayor and Councilmen*, 70 Federal, 739.)

3. As we have seen, the ordinance of June 21, 1883, with its amendment, did not recognize or purport to regulate the Covington Electric Company. It was an attempt upon the part of the City of Covington to grant franchises, and not to regulate the exercise of any franchise which had been granted by the state. The requirements contained in that ordinance were expressly prescribed for companies exercising a privilege *granted by that ordinance*, and could not be held to apply to the exercise of a privilege which was not granted by that ordinance, but which was granted by an act of the General Assembly of the State of Kentucky. We claim, therefore, that there never was in existence any ordinance of the City of Covington, requiring the Covington Electric Light Company to give a bond.

If, however, the ordinance of June 21, 1883, could be construed to impose requirements upon the Covington Electric Light Company by its terms, then we claim that said ordinance was invalid and contrary to law, and not binding upon the Covington Electric Light Company. That company had received an exclusive franchise from the state by a law which provided that it should have for a period of twenty-five years the exclusive privilege of carrying on the business of furnishing electric light to the city and its inhabitants. The effect of such a law was to prohibit the City of Covington from granting such a franchise to any other company, and the City of Covington was not only without power to pass the ordinance of June 21, 1883, but in passing that ordinance it was defying a direct prohibition of the law of Kentucky. Section 8 of that ordinance provided for the granting of such a right to any company, firm or individual, and required any such company, firm or individual to give a bond. In other words, section 8, as well as the remainder of the ordinance, provided for the granting of franchises inconsistent with the act of April 22, 1882, was a violation of said act, and was void in toto.

Being a void ordinance, and in violation of an act of the General Assembly prohibiting such action on the part of the City of Covington, none of its provisions was binding upon the Covington Electric Light Company, even if they could be construed to apply by their terms to that company.

4. Even if the City of Covington had imposed upon the Covington Electric Light Company a valid requirement to give a bond, as one of the regulations which the city had a right

to impose, and even if we assume that the city had the right to impose such regulations, nevertheless the failure of the company to give such bond can not now be asserted as having brought about an automatic forfeiture, or as being even a ground of forfeiture.

It is to be borne in mind here that the consent of the city, or obedience to its regulations, was not a condition precedent upon which the vesting of the franchise depended. It can not be claimed, therefore, that the failure to give bond could in any event have prevented the vesting of the franchise. The giving of such a bond, if a valid requirement, and one which could affect the franchise at all, was merely a condition subsequent, and the failure to give bond could not, therefore, produce an automatic forfeiture. Whatever remedy the city might have had in the event of a refusal by the company to give bond in spite of the city's requirements that it should do so, the city certainly has not the right, after the company has been in possession, with its acquiescence, for ten years, to claim that a failure to give bond produced an automatic forfeiture or destruction of the franchise.

Upon this point we again call the attention of the court to the reasons and authorities which have been cited on the preceding pages of this brief as to the effect of the non-compliance with the conditions subsequent, and to repeat and make special application to the principle there set forth, it seems clear that the failure on the part of the company to give a bond, even if there were a valid requirement of that sort, could not be treated as having *ex proprio vigore* produced a forfeiture or destruction of the franchise.

5. The final reason why the city's point in this regard is not well taken is, that the city itself waived the giving of the bond by implication and expression. The company commenced using the streets and public places of the City of Covington in the transaction of its business under its franchise in January, 1891. The city is charged with notice of that fact, and the evidence of this case shows that it had notice, and from that date until some time in the latter part of 1897, no objection or comment was made by the city or any of its officers to the carrying on of an electric light business in the City of Covington, without having given a bond.

In 1897, the city desired to make a contract with the company to light the streets of the city with electricity. Before entering into such contract, the city council passed a resolution referring to a committee of council the question of whether or not the company had a valid franchise on the streets of Covington. To this committee was added the city solicitor. The committee and the solicitor made a report, finding expressly that for valid reasons the company was not required to give a bond, and that, in spite of the failure to give the bond, the company had upon the streets of Covington at that time, in 1897, a valid franchise, with all the rights granted to it by its act of incorporation in 1882. This report is appended to this brief (see Appendix E). In this report council concurred unanimously, and upon the basis of that report the City of Covington entered into a contract with the company, by which the company undertook to light the streets with electric lights. Since that time the company has been furnishing electric light to the city, under that contract or some successor to it, and it has been paying the company's bills, not regularly, we regret to say, but without objection on the score of the company's franchise, and with sufficient regularity to constitute an estoppel as against the city.

Furthermore, the evidence in this case shows that the city has been for years collecting a franchise tax from that company upon this particular franchise, and that the company has been regularly paying that franchise tax.

We claim, therefore, that whatever may have been the legal obligation of the company in giving the bond, or whatever may have been the legal effect of its failure to do so, the city has, as a matter of fact, waived the giving of the bond, and that its absence can not now be set up as a defense of this action.

III.

The consolidation of the Covington Electric Light Company with the other companies under the name of the Suburban Electric Company carried to the new company this exclusive franchise.

It is claimed that in some way this company lost through consolidation its exclusive franchise in the City of Covington. We fail to see any ground for this contention. Section 555

of the Revised Statutes of Kentucky provides how the consolidation shall be effected, and Section 556, relating to the rights and liabilities of a consolidated corporation, is as follows:

> "When the agreement is signed, acknowledged and recorded in the same manner as articles of incorporation are required to be, the separate existence of the constituent corporations shall cease, and the consolidated corporations shall become a single corporation, in accordance with the said agreement, and subject to all the provisions of this chapter and other laws relating to it, and shall be vested with all the property, business, credits, assets and effects of the constituent corporations without deed or transfer and shall be bound for all their contracts and liabilities."

We fail to see how there could be any claim made under this statute that the consolidated company did not take the exclusive franchise of the Covington Electric Light Company. It must be admitted that the franchise of the Covington Electric Light Company was by its terms assignable, and the Covington Electric Light Company sold or disposed of that franchise to some one else. In other words, the franchise was property; it was an asset of the company; and under the terms of the statute above quoted, that property right passed to the new company.

2 Clark & Marshall on Private Corporations, Section 355*a*, contains the following pertinent language, sustained by authority:

> "If there is no provision to the contrary in the statute or the agreement between the parties, the general rule, based upon the presumed intention of the Legislature and the corporations, is that the consolidated corporation acquires by the consolidation all the rights, franchises, privileges and property of the consolidating corporations, subject to the same burdens and restrictions which attached thereto in the hands of the consolidating corporations, respectively, under their charters."

In the case of the *Philadelphia and Wilmington Railroad Company* v. *Maryland*, 10 Howard, 376, the decision of the Chief-Justice contains the following language:

> "And the law which authorizes these two companies to unite themselves with the plaintiff in error,

declares that this new corporation, that is, the Philadelphia, Wilmington and Baltimore Railroad Company, shall be entitled within this state to all the powers and privileges and advantages at that time belonging to these two companies. It grants it nothing more.

"Now, as these companies held their corporate privileges under different charters, the evident meaning of this provision is, that whatever privileges and advantages either of them possessed should in like manner be held and possessed by the new company, to the extent of the road they had respectively occupied before the union; that it should stand in their place, and possess the power, rights and privileges they had severally enjoyed in the portions of the road which had previously belonged to them. And this intention is made still more evident by the fourth section of the law, which makes the new corporation responsible for the contracts, debts, obligations, engagements, and liabilities at law or in equity of the several companies, and declares that it shall hold and be entitled to all the estate, real, personal, and mixed, choses in action, etc., belonging to or due to the several companies."

See also to the same effect the *New Orleans Gas Company* v. *The Louisiana Light Company*, 115 U. S., 650.

It can not be questioned, therefore, that on the face of the statue, and in view of the nature of the consolidation which was effected in the case at bar, the consolidated company acquired from the Covington Electric Company this exclusive franchise, with all of the attributes and liabilities attaching thereto, immediately prior to the consolidation, in the hands of the Covington Electric Light Company.

It is claimed, however, that in some way the Covington Electric Light Company and the Suburban Electric Company became subjected to the provisions of the new constitution by virtue of the consolidation, and that under the new constitution this exclusive franchise could not exist, and was therefore relinquished by the consolidation.

We think that this position is untenable. In the first place, no intention appearing to subject its charter to the provisions of the new constitution, it does not follow that the Covington Electric Light Company, by entering into the consolidation subjected itself to that instrument to any greater extent than it had been before.

Citizens' Street Railway Company v. *Memphis*, 53 Federal, 713.

In the second place, even if the agreement of consolidation subjected this company to the new constitution, there is nothing in that instrumnt which destroys or affects this exclusive franchise; on the contrary, its existence and validity are specifically recognized. Section 191 of the present Constitution of Kentucky is as follows:

> "All existing charters or grants of special or exclusive privileges under which a *bona fide* organization shall not have taken place, and business been commenced in good faith, at the time of the adoption of this constitution, shall thereafter be void and of no effect."

This section provides for the forfeiture of all charters and grants of special or exclusive privileges under which an organization shall not have taken place, and business not been commenced at the time of the adoption of the Constitution, and it just as clearly and definitely means that all existing charters and grants of special or exclusive privileges under which a *bona fide* organization *shall have taken place*, and *business have been commenced*, shall be valid, and shall continue to exist under the sanction and approval of the new constitution. This proposition is too plain for argument.

The Covington Electric Light Company had a *bona fide* organization for several years prior to the adoption of the constitution, and it had commenced business in good faith prior to the adoption of the constitution, so that it is entitled to the benefit of the principle just laid down.

As the constitution expressly recognizes, therefore, the validity of a charter or a grant of a special or exclusive privilege under which a *bona fide* organization had taken place and business had been commenced, it can not be claimed that there is anything in the new constitution which was inconsistent with the franchise here asserted. Even if, therefore, the consolidation brought this charter under the provisions of the new constitution, that did not invalidate or curtail in the slightest degree the franchise in question, because that franchise is directly and explicitly recognized by the new constitution. But we are referred to Section 3 of the Bill of Rights, which contains the following language:

> "And no grant of exclusive separate public emoluments or privileges shall be made to any man, or set of men, except in consideration of public services."

It is claimed that this language would forbid the grant of an exclusive franchise, and that, therefore, the consolidation, by bringing the corporation under the provisions of the new Constitution, invalidated the exclusive franchise in question.

This question has been passed upon by this Court clearly and directly. The language in question does not forbid the granting of an exclusive gas or electric franchise, because such a grant is made in consideration of a public service, and is therefore valid. In the case of the *Louisville Gas Company* v. *The Citizens Gas Company*, 115 U. S., 683, the third paragraph of the syllabus is as follows:

> "A legislative grant of an exclusive right to supply gas to a municipality and its inhabitants by means of pipes and mains laid through the public streets, and upon condition of the performance of the service by the grantee, is no infringement of that clause in the Bill of Rights of Kentucky, which declares 'that all freemen, when they form a social compact, are equal, and that no man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services.'"

In a case heretofore referred to, viz., the case of the *New Orleans Gas Company* v. *The Louisville Light Company*, the same rule is laid down.

See also, to the same effect, *The New Orleans Water Works Company* v. *Rivers*, 115 U. S., 674.

In the light of the authorities quoted, we think it is perfectly clear that the consolidation carried to the new company franchises of the old company in their entirety, and that, even if it can be claimed that by the act of consolidation the corporations embraced the new constitution, and came within its terms, there is nothing in the new constitution which either forbids or terminates an exclusive franchise of the character indicated. On the contrary, the validity of such a franchise is expressly recognized by the constitution itself and by this Court in its interpretation of that instrument.

We can not distinguish the argument used by the court below in rendering its opinion on the question of consolidation from the argument employed on the repealing effect of Section 573, which will be discussed presently in our brief. The court apparently states that the consolidated company acquired all of the property and assets of The Covington Electric Light Company, including the franchise to occupy the streets and conduct the electric light business in the city of Covington. The opinion, however, concludes that the exclusive feature of that franchise was a mere immunity from competition, severable from the franchise itself; that it was appurtenant to the corporate power to carry on the business and not to the franchise to occupy the streets; that these rights came to the new company, not by transfer from the old companies, but by what was, in effect, a new grant from the state, and that consequently the consolidation proceedings did not carry to the new company anything which was not obtainable under the constitution and statutes at the time of the consolidation, and takes as a parallel case an exemption from taxation.

Our answer to this position taken by the lower court is that the exclusive feature of our franchise, no matter how it might be worded, was a property right for which we paid a consideration in the public service which we undertook to render, and under the authority of the cases cited hereafter in the discussion of the effect of Section 573, the exclusive feature is deemed an integral part of the franchise. This being true, it is property, just as much as the franchise itself is property, and it, therefore, passed under the consolidation proceedings just as much as poles, wires, motors or generators passed.

IV.

The franchise was not repealed by the passage of the Covington city charter.

Counsel for the City of Covington lays great stress on the alleged power of repeal possessed by the state by virtue of the act of 1856, and Section 3 of the new Constitution.

The act of 1856, now contained in Section 1987, of the Kentucky Statutes, is as follows:

> "All charters and grants of or to corporations, or amendments thereof enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to repeal at the will of the General Assembly, unless a contrary intent be therein plainly expressed; provided, that whilst privileges and franchises so granted may be repealed, no repeal shall impair other rights previously vested."

We do not deny, therefore, that the General Assembly of the State of Kentucky had the power of amendment or repeal set forth in the foregoing statute, but we do claim:

First. That the power of repeal is not itself equivalent to a repeal.

Second. That the power of repeal does not include the power to destroy our rights upon the streets of Covington after they once vested.

Third. Whatever power the State of Kentucky had, it has never directly or indirectly altered, amended or repealed the charter and franchise which we assert in this case.

1. With reference to the first proposition, we think that there is some confusion in the mind of the counsel for the City of Covington as to the effect of a reserved power of repeal. He contends that by virtue of the act of 1856, the State of Kentucky reserved the power to amend, alter or repeal the charter of the Covington Electric Company, especially in view of the fact that said charter does not contain any language which negatives such a reservation. With this contention we are not disposed at this time to take issue. But counsel for the City of Covington goes on to assume from this principle that when an exclusive privilege is given by a special charter, and that charter does not contain words negativing the right of amendment or repeal, the franchise thereby ceases to be exclusive. In other words, that if the Legislature gives an exclusive franchise in a charter which it reserves the right to repeal, that by virtue of such reservation, the exclusive feature of the franchise is of no avail.

We submit that a mere statement of that proposition furnishes its own contradiction.

It must appear that the General Assembly not only had the power of repeal, but that it did, in fact, repeal by language which is free from any doubt.

2. The power to amend, alter or repeal the charter of the Covington Electric Light Company, if such a power existed, relates to the corporate existence and powers of the corporation, and does not include the right to deprive that corporation or its stockholders of any vested property rights.

The exclusive franchise of the Covington Electric Light Company was a naked privilege until the company took possession under it. When the company entered into possession of the franchise and occupied the streets of the City of Covington in January, 1891, that franchise became a vested property right, and was no more subject to amendment, alteration or destruction by the Legislature than was the plant or other assets of the company.

In the case of *Orr* v. *Bracken County*, 81 Kentucky, page 593, the general principle upon this subject is laid down in the first paragraph of the syllabus, and we cite the case simply as an expression of the general principle, and not with the claim that the case is on all fours with the case at bar. The first syllabus is as follows:

> "Although the right to amend the charter of a private corporation may be expressly reserved, that right does not confer upon the General Assembly the power to take away from the corporators the control of the corporate property."

See also the case of *People* v. *O'Brien*, 111 N. Y., 1.

3. Whatever may have been the power of the state, there is nothing in this record to show, and it is not the fact, that the State of Kentucky ever did repeal, in whole or in part, the charter of the Covington Electric Light Company.

It is claimed that this repeal was accomplished by the city charter of Covington, passed some time in 1894. The specific language relied on is that of Section 3058-6 of the Revised Statutes of Kentucky, which is as follows:

> "The general council shall have power by ordinance . . . to provide by themselves, or through others, for lighting the streets, public places and buildings, and furnishing light to the inhabitants, and to regulate the quality and quantity of the light, and method, time of, and appliances for furnishing the same."

This statute, in fact, the whole act, relates to cities of the second class, and thus applies to Covington, Newport and Lexington. It confers general powers upon those cities, to last for all time until altered by the Legislature, and it very properly gives each one of those cities the power to provide, by themselves or through others, for lighting the streets and furnishing light to the inhabitants. There is nothing, however, in such a power that can be construed as a repeal of an existing exclusive franchise for a limited number of years in any one of the cities named.

The fact that the city is given power to provide "through others" for lighting the streets and furnishing light to the inhabitants, recognizes the validity of an exclusive franchise relating to any one of the cities covered by the statute in question.

Furthermore, the exclusive franchise in question in this case, being for a limited period of time, an act authorizing the City of Covington and other cities to light their own streets, and being properly applicable for an indefinite period of time, is not inconsistent with the exclusive franchise.

We submit, therefore, that there is nothing in the act for the government of cities of the second class which can be construed into an express or implied repeal of the act giving to the Covington Electric Light Company an exclusive franchise upon the streets of Covington. This is very clearly set forth in the case of *The City Railway Company* v. *The Citizens' Railway Company*, 166 U. S., 557. In that case, a street railroad company had a franchise upon the streets of Indianapolis under an act of the Legislature. The city council attempted to give the same franchise to another company before the expiration of the first company's grant, and attempted to act upon the authority of the city charter of Indianapolis, giving to the city entire control of street railway companies within its limits. Upon this point the court says:

> "Did the act of 1891, known as the new charter, repeal the act of 1861, authorizing the incorporation of railway companies? In other words, should it be construed as an exercise of the power, reserved to the state, in the eleventh section of the act of 1861, to amend or repeal that act at the discretion of the Legislature? As the act of 1891 practically established a new system and vested the whole power of the Legislature over street

railway companies in the board of public works of the several cities therein named, subject to the approval of the common council of such cities, perhaps it might be construed to repeal the former, so far as there was a conflict between the two acts; but it certainly should not be construed to act retrospectively, or to affect contracts entered into prior to its passage, unless its language be so clear as to admit of no other construction. While it was doubtless intended to authorize the board of public works of the cities covered by the act to contract for the use of their streets by railway companies, there is nothing from which can be inferred a power to disturb or interfere with contracts already existing—indeed, it is highly improbable that it would ever have delegated such a power to a subordinate body."

See also to the same effect the opinion of Mr. Justice Brewer, delivered in the case of *Rodgers* v. *United States*, 185 U. S., 83.

However, if there were any question whether Section 3058-6 was intended as a repeal of any existing franchises held by private corporations, such question would be answered conclusively by Section 3197 of the same act, which is as follows:

> "The repeal of any law by the provisions of this act shall not in any wise be so construed as to affect any *right* or *liability acquired* or *accrued* thereunder, by or on the part of the city, *or any person or body corporate;* and this act shall not in any manner affect any right, lien or liability accrued, established or subsisting under and by virtue of previous charters or amendments thereto or ordinances passed thereunder, but such right, lien or liability shall be enforced and such action or proceeding shall be carried on in all respects as if this act had not taken effect; nor shall this act be in anywise so construed as to affect the right, or liability acquired or accrued under previous charters or amendments thereto or ordinances passed thereunder, on the part of the city or any person or body corporate."

And this language makes perfectly clear the intention of the Legislature to leave unchanged any franchises existing in the various cities covered by the act.

V.

The company's franchise was not repealed by section 573 revised statutes of Kentucky.

Section 573 of the Revised Statutes of Kentucky is as follows:

> "*Charters in conflict with this chapter—Provisions relating to—Penalty.* The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation, which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897; and if the officers, managers or agent of such corporation shall, after said date, exercise any powers, privileges or immunities repealed by this section or inconsistent with the provisions of this chapter, relating to similar corporations, or which could not be obtained under this chapter, the officer, manager or agent so offending, and the corporation for which he acts, shall each be guilty of a misdemeanor, and fined for each offense not less than one hundred nor more than one thousand dollars, and upon the conviction of the corporation, the trial jury may, at their discretion, direct the forfeiture of its charter or articles of incorporation, in which case the court shall so adjudge. After the 28th day of September, 1897, the provisions of this chapter shall apply to all corporations created or organized under the laws of this state, if said provisions would be applicable to them if organized under this chapter."

The portions of the statute relied upon may be separately stated as follows:

> "1. The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly, or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, . . . shall stand repealed on September 28, 1897.
>
> "2. And all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter shall stand repealed on September 28, 1897."

Let us endeavor to determine whether the exclusive franchise in question in this case is repealed by either of the above quoted provisions.

1. Is that franchise a provision of our special charter, which is inconsistent with the provisions of "this chapter concerning similar corporations?" Without undertaking to define the term "provision" of a "charter" at this point, it is sufficient to say that our franchise is not inconsistent with the provisions of the chapter in question concerning similar corporations. The expression "this chapter" relates to Chapter 171 of the General Statutes of Kentucky as enacted on April 5, 1893, and as found in the Laws of 1891-3, on page 612, which is the General Corporation Act and substantially corresponds to Chapter 32 of the Revised Statutes.

It is evident from an examination of the act of April 5, 1893, and from an examination of Chapter 32 of the Revised Statutes, that "this chapter" does not contain anything "concerning similar corporations." There is nothing in said chapter relating to an electric lighting corporation which is incorporated and organized under the general law, and there are no special provisions relating to it. There is nothing, therefore, with which our charter can be inconsistent.

Furthermore, there is nothing in that chapter relating to corporations of any kind, general or particular, which is inconsistent with the exclusive franchise that we claim.

It is unnecessary, therefore, at this point to consider whether the exclusive franchise granted to us by our charter is a "provision" of our charter, within the meaning of Section 573, or whether the word "provision" relates merely to the powers as distinguished from the property rights of the corporation.

2. Is our exclusive franchise covered by the language of Section 573 "all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter?"

We contend most earnestly that this clause applies to such powers, privileges or immunities as can not be classed under the head of property rights, and does not apply to a franchise upon the streets of a city or upon a road, such rights being in

the nature of property and not in the nature of powers, privileges or immunities.

The act of April 5, 1893, being the chapter referred to, did not purport to control or regulate such corporate property rights as a municipal lighting franchise, or a street railway franchise, or anything of that sort. It does not provide any method by which such franchises can be obtained, and makes no reference to a franchise of that character. No lighting franchise, or street railway franchise, or water franchise could be obtained by any company upon any terms "under the provisions of this chapter," and if the claim made by the City of Covington with reference to the effect of Section 573 is a valid claim, then it follows that on September 28, 1897, every gas, electric, street railway, railway and water franchise in the State of Kentucky immediately expired, because no franchise of that character could possibly be obtained by any company under the provisions of the chapter in question. The manner of obtaining such franchises is provided for in other chapters, and the chapter in question only relates to the organization of the corporations; their rights; their liabilities; the rights and liabilities of their stockholders; the powers of their directors and questions of this sort which relate to the inherent powers of the corporation, and it does not purport to relate in any respect to the method by which a corporation may acquire such a property right as an electric franchise.

In the case of *Williams* v. *Nall*, 21 Reporter, 1526, Section 573 was invoked for the purpose of imposing upon the stockholders of a certain corporation a double liability which was not upon them at the time of the organization of the corporation, and this case illustrates the point we have in mind.

Section 547 of the Kentucky Statutes, which is a part of "this chapter," relates to the question of the liability of stockholders, and as the liability of stockholders is one of the questions covered by the chapter we are considering, Section 573 could very well relate to that immunity or privilege.

We conclude, and we think it is perfectly clear that Section 573 only relates to such matters as are within the purview of the chapter in question and embraced within its general purpose; viz., matters of the organization and the powers of a corporation; the powers of its officers, and the rights and lia-

bilities of its directors and stockholders, and does not relate to such a property right as an electric franchise.

In the decision of this case, the court below, however, took the position that our exclusive right related, not to the occupancy and use of the city streets, but related, and was appurtenant, to the right to carry on the business. The language of our charter is as follows (See Appendix A):

> "The body hereby incorporated shall have the exclusive privilege of conducting the business above described within and adjacent to said city for the term of twenty-five years."

The court, in its opinion, reasoned that the right to carry on an electrical business is a right which can be obtained now under the chapter of which Section 573 is a part, and concluded therefrom that an exclusive right appurtenant to the power to carry on the business was prohibited by Section 573, although that exclusive right would not be so prohibited if it had applied merely to the occupancy of the streets of the city for the purpose in question.

But we claim that the exclusive feature of our charter is an essential and integral part of the franchise acquired by us from the State of Kentucky, in consideration of public service, to be rendered by us; that as such it is a contract right, and is property to the same extent that our right to occupy the streets at all, our poles, wires and plant are property. The fact that the exclusive feature of the contract is stated in that paragraph relating to corporate powers, and not in the paragraph relating to the occupancy of city streets, does not, in our judgment, affect the question. The charter is to be taken together as a whole, and what we own is the thing given to us by the charter, whether it be contained in one or another of the paragraphs of the charter. If we had been given an exclusive right to occupy the streets and public places of the city for the purpose stated, it would have been equivalent to giving us the exclusive power of carrying on that business in that place; on the other hand, if we are given the exclusive power of carrying on the business in that place, it is the equivalent of giving us the exclusive right to occupy the streets and public places for that purpose. The substantial right which we obtained is the test, and not the phraseology or arrangement giving us that right.

Exclusive franchises are granted in various ways. The exclusive feature of a franchise may be expressed as a part of the corporate power, or it may be expressed as a part of the clause authorizing a company to use the streets for the purpose indicated, or it may be expressed simply in the form of a sentence in a charter forbidding other companies to engage in the light business during the time and at the place named. In any event, it is the same; it is an exclusive franchise which, when accepted and acted upon by the company, becomes a contract binding upon both parties; and it becomes the property right of the company just as thoroughly as any contract which it possesses.

In the case of *Bridge Proprietors* v. *Hoboken Company*, 1 Wallace, 116, the exclusive feature of the charter was not attached to either the corporate power or to any easement, but was simply in the form of a prohibitive enactment forbidding others to engage in a like occupation. The court held that it was nevertheless a contract, being an essential part of the entire transaction. (See page 146).

In the case of *The Binghamton Bridge Company*, 3 Wallace, 51, the charter was of the same sort, and with the same phraseology, and on page 68 the argument of counsel calls attention to the fact that the exclusive feature does not appear to be a part of the contract, but is a mere prohibitory enactment. The court, nevertheless, held this to be a contract, and to create a contract or property right. (See pages 74 and 75).

In the case of *New Orleans Gas Company* v. *Louisiana Light Company*, 115 U. S., 650, the charter was of the same sort as the one in the case at bar. The exclusive rights of the company apparently were appended to the corporate power rather than to the occupancy of the city streets, but this suggested no distinction to the court, as it was held to be a contract right belonging to the company. See page 658, 659, where it was held that in effect the company was acting as the agent of the state in the performance of a public duty, and that the contract right or exclusive privilege which had been given to it was the consideration paid to it for the performance of the public duty.

In the case of *New Orleans Water Works Company* v. *Rivers*, 115 U. S., 674, the court makes very clear that in a charter of this character the exclusive feature attaches not only to the corporate power, but also to the occupancy of the city streets.

The company was given the exclusive privilege of supplying the City of New Orleans and its inhabitants with water from the Mississippi or any other stream or river by means of conduits, etc., and then was given the necessary power (although not expressly exclusive) to use the city streets for the purpose in question. The owner of the St. Charles Hotel obtained from the city the power to lay a pipe from the river to his hotel on the city streets, and not for purpose of carrying on business or to compete with the company owning the franchise; but the court held that the exclusive feature of the company's charter would be violated by the grant to Rivers. The opinion of the Court on page 680 and 681, shows clearly that the charter in that case, which was similar in the respects stated to the charter in this case, gave to the company the exclusive right to use the streets and public places of the city for that purpose.

In the case of *The Louisville Gas Company* v. *Citizens Gas Company*, 115 U. S., 683, the counsel for the new company endeavored to draw a distinction between an exclusive privilege of laying pipes in the streets, and an exclusive privilege to make and sell gas. (See page 688 and 690). But the court held, in spite of that attempted distinction, that the right of the Louisville Company was a contract right and was property.

We call the Court's attention to the dissenting opinion of Judges Lewis and Prior in the case of the *Citizens Gas Light Co.* v. *Louisville Gas Co.*, in the Kentucky Court of Appeals, 81 Kentucky Reports, page 280. The opinion of the majority of the Court was reversed in the Supreme Court in the case last referred to, and the dissenting opinion of the minority in the Court of Appeals is here referred to as indicating the point at issue between the majority and the minority of the Court.

See also to the same effect, *Tammany Water Works* v. *New Orleans Water Co.*, 120 U. S., 64.

In the case of *The California State Telegraph Co.* v. *Alta Telegraph Co.*, 22 Cal., 423, the Court said:

> "The grant of a franchise is in the nature of a vested right of property; subject, however, in most cases to the performance of conditions and duties on the part of the grantee. They generally involve important duties of a public character, often onerous upon the grantees. They are necessarily exclusive in their character, otherwise their value would be liable to be

> destroyed or seriously impaired. So long as the grantee fulfills the conditions and performs the duties imposed upon him by the terms of the grant, he has a vested right which can not be taken away or otherwise impaired by the Government any more than other property."

It seems to us clear, upon the authorities quoted, in the first place, that an exclusive franchise is a composite whole, a unit, and that the exclusive feature attaches to, becomes a part of everything necessary to protect a corporation against its violation, and that whatever phraseology may be used to confer it, or to whatever part of the charter it may be appended, it applies not only to the corporate power, but to the franchise to use the streets.

In the second place, as the state enacting such a charter establishes a company as its agent for the purpose of the performance of a public duty, and in consideration thereof makes a contract with it exclusive in its character, it can not afterwards be claimed that the thing which the company gets from the state is a mere power, privilege or immunity. It is a contract, a right, a property right, which is entire, and which should be protected by the courts.

It is not necessary for us to deny, as a part of our argument, that the Legislature may, if a power of repeal be reserved, repeal the exclusive feature without repealing the remainder. This would be in the nature of an alteration rather than a repeal. But what we claim is that, even assuming this power on the part of the Legislature, it was not, as a matter of fact, exercised in the passage of Section 573, because neither the word power, privilege or immunity can be held to be an appropriate or apt description of the exclusive feature of our contract, separate and distinct from the remainder of it.

Such a contract right is not to be classed as an immunity.

In the first place, whether such a grant were made, upon consideration or otherwise, we do not think it can be properly defined as an immunity. In Bouvier's Law Dictionary an immunity is defined as follows:

> "An exemption for serving in an office or performing duties which the law generally requires other citizens to perform."

In Anderson's Law Dictionary it is defined as follows:

"Exemption from a duty, obligation, penalty or service which the law requires of citizens in general."

In Webster's Dictionary it is defined as follows:

"Freedom or exemption from any charge, duty, obligation, office, tax, imposition, penalty or service."

The origin of the word makes its meaning perfectly clear. The Latin word *immunitas* means free from a public service, being derived from the prefix *im*, meaning *not*, and *minus*, which means service or duty.

Immunity, therefore, used as a legal expression, means the exemption of a person or corporation from the performance of some duty or obligation.

It is not every freedom from something which may be properly definable as an immunity. Health is freedom from disease, but you would not properly define health as being an immunity. Wealth results in freedom from poverty, but wealth could not be defined as an immunity. A thing can not be properly defined as an immunity unless it be an exemption from the performance of some affirmative duty otherwise resting upon the person in question. We think, therefore, that to describe an exclusive privilege as being an immunity, on the theory that it exempts one from competition, is an improper and an erroneous use of the word immunity.

We have not been able to find any case in which an exclusive franchise is described as an immunity from competition, or from anything else.

The case of *Williams* v. *Nall*, 21 Ky. L. R., 1526, involves a typical immunity or privilege. It was a right given to the corporation to exempt its stockholders from liability for corporate debts, a liability which is imposed by the very chapter of which Section 573 is a part.

Neither can the exclusive feature of our contract with the City of Covington be separated from the balance of the contract and described as a privilege or a power. A privilege is a permission to do something, or it may be an immunity from a public duty. If the Legislature had intended to include the exclusive feature of such a contract as the one in question, it would have described it as an exclusive privilege or a special

privilege, or an exclusive contract, or some other apt and precise definition. It might have been called a monopoly, or a dozen other expressions might have been applied to it which would be more appropriate than the word "privilege."

If the word "privilege" is to be used at all as applicable to a subject matter of this character, it would include as well the franchise itself as the exclusive feature thereof. This, we think, would show the plain inapplicability of the word to the subject matter, as it would then be getting into a realm which is entirely outside of the purview of the chapter in which Section 573 occurs.

Where, as in the case at bar, a corporation has a clear and unambiguous franchise undeniably exclusive in its character, the courts require the clearest evidence of an intent to repeal it, and this is especially true with reference to the effect of a general law. We do not know of a case in which a law so general in terms as the one in question in this case has been held to be a repeal of a specific contract right in the charter of a company. In Clarke & Marshall on Corporations, the following language appears:

> "Even when the Legislature has reserved the power to repeal the charter of a corporation, a subsequent statute will not be construed as repealing it, unless such an intent on the part of the Legislature is expressed in the statute or necessarily implied. Repeals are not favored, and such a construction should be placed upon statutes, when possible, as to avoid a repeal."

See also *The City Railway Co.* v. *Citizens Railroad Co.*, 166 U. S., 557-564.
Rodgers v. *U. S.*, 185 U. S., 83.
Binghamton Bridge, 3 Wallace, p. 75.

Considered as a property right, we do not think that it is inconsistent with the general law of Kentucky relating to corporations of like character. An exclusive franchise to furnish electric light to the City of Covington and its inhabitants, is a right which could be obtained under the present statutes. True, it could not be obtained under the chapter of which Section 573 is a part, but neither could any franchise be obtained under that chapter, and for that reason we do not think that Section 573 applies to rights of that description. But cer-

tainly if the purpose of Section 573 was to produce uniformity, and merely to produce uniformity, in the laws relating to corporations, it could not be held to be a repeal and extinguishment of a right which, as a matter of fact, could now be obtained under general laws. The Constitution permits exclusive franchises in consideration of public service. There is nothing in the Statutes which forbids them, and the charter of the city contains the express language that none of the powers therein given to the city shall be so construed as to destroy any right acquired under any law theretofore passed. (See Section 3197). These provisions of the Constitution and of the statutes seem to us to indicate that Section 573 was not intended to destroy any exclusive franchise which, in consideration of public service and the performance of a public duty delegated by the state, had been lawfully granted to and enjoyed by a private corporation.

Section 3 of the Kentucky Constitution recognizes the validity and desirability of exclusive franchises of the character in question, and Section 191 of the Constitution preserves in force and effect all such exclusive franchises under which corporations have commenced to transact business.

We think, therefore, that such an exclusive contract is not out of harmony with the existing laws of the Constitution of the State of Kentucky.

Under Sections 163 and 164 of the Constitution, and under the Covington charter, we think it is perfectly clear that the City of Covington, acting on behalf of the state as its constitutional agent for that purpose, would have the power to grant to a corporation the exclusive right to furnish electric light to the City of Covington and its inhabitants, using the streets and public places for that purpose. Under the chapter of which Section 573 is a part, a company could acquire the corporate power to exercise such a franchise, so that whether the exclusive feature be attached to the corporate power to be exercised in the City of Covington, or whether it be attached to the privilege of using the streets and public places in the City of Covington, we think it clear that Section 573 does not repeal the same. We could get under the present Constitution and laws substantially what we have under this charter, viz., an exclusive right to furnish the City of Covington alone, or the City of Coving-

ton and its inhabitants, with electric light, using the streets and public places for that purpose, and we think it was clearly not within the purpose of Section 573 to repeal or to modify the charter, so as to destroy a vested contract right of that character.

If we are right in our contention that the exclusive franchise of the Covington Electric Company was a contract right, and is property, and further, that it is something which in substance could be obtained under present laws relating to the subject matter, that it would follow that consolidation passed it on to The Suburban Electric Company, and the arguments heretofore made apply thereto.

CONCLUSION.

We desire to say in conclusion that for ten years prior to the bringing of this suit, the City of Covington has treated the franchise of the appellant as a valid and subsisting contract right; upon the faith of this the appellant had expended large sums of money in the development of its plant and the perfecting of its system. It is too late now for the city to ignore the rights of the company, and to violate with impunity the terms and spirit of the franchise granted by the Legislature of Kentucky. That franchise, as we think we have shown, is valid and in full force and effect, and the court has the power to protect it against the unlawful acts of the City of Covington.

All of which is respectfully submitted.

MILLER OUTCALT,
RICHARD P. ERNST,
ALFRED C. CASSATT,
Attorneys for Appellants.

APPENDIX A.

AN ACT TO INCORPORATE THE COVINGTON ELECTRIC LIGHT COMPANY.

Section 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That Horace W. Woodruff, William B. Moore, Jr., William H. Glore, and their associates, successors and assigns, shall be, and they are hereby created, a body politic and corporate by the name of the Covington Electric Light Company, with power, and in that name, to contract and be contracted with, to sue and be sued, to plead and be impleaded; to answer and defend in all courts and places whatsoever as a natural person, and to have and to use a common seal and to change, renew or alter the same at pleasure; to ordain and put in execution such by-laws, rules and regulations for the government of its affairs, as it may deem expedient and proper, and the same may be altered or amended at any regular or call meeting by a majority vote of the *paid-up*, after a motion to that end shall have been entered at any regular or call meeting held not less than thirty days before; provided, however, that said by-laws, rules and regulations shall not be inconsistent with the Constitution of this state and of the United States.

Sec. 2. The capital stock of said company shall be fixed by the corporation aforesaid, but shall not exceed one hundred and fifty thousand dollars divided into shares of one hundred dollars each. When the sum of five thousand dollars is subscribed and paid up said company shall have authority to organize and commence business. The share of said stock shall be transferable on the books of the company according to the by-laws, but the company shall hold a lien upon the shares of any stockholder who may be indebted to it, and such shares shall not be transferable without the consent of the president and directors, until said debt shall have been paid or discharged. Each share shall entitle the holder to one vote in person or by written proxy in all elections of officers and at any and all meetings of said company for any purpose.

Sec. 3. The said company shall have the right, and its directors, to take from its officers or agents bonds for the faithful discharge of duty, and for the safety and security of its funds and property.

Sec. 4. There shall be elected at each annual meeting of the stockholders a president, vice-president and treasurer, and five directors, and this number of directors may, by a vote, as hereinbefore provided, be increased to nine, and shall hold their office for one year, and until their successors are elected. A majority of the same shall constitute a quorum for the transaction of business. Vacancies that may occur in the term of any director or other officer may be filled by the board. The annual election, after the first one, which may take place at any time after organization, shall be held at the office of the company in the City of Covington on the second Monday of January of each year. At all meetings of the directors, they shall vote in person and not by proxy.

Sec. 5. That the business of said company is limited to furnishing and supplying the City of Covington, and its inhabitants and persons and corporations located near said city, with ligh and motive power generated by electricity, steam or other artificial means, or of furnishing or supplying either said light, power or heat, and may charge therefor such price and compensation as may be agreed upon between the said company and the individual or corporation contracting with it, and in aid of its object, it may acquire and hold such real estate as may be necessary for the location of its works and carrying into effect the purposes of its organization, and the body hereby incorporated shall have the exclusive privilege of conducting the business above described within and adjacent to said city for the term of twenty-five years, but a non-user of the privilege of this act of incorporation for five years shall work a forfeiture.

Sec. 6. Said company shall have the privilege, subject to the regulations of the city authorities, to lay its pipes and mains, and erecting its poles, posts and wires through and along any street or highway in the city aforesaid or adjacent thereto as it may deem fit; provided, it in no way permanently obstructs the use of the same to the public or individual, and it is hereby required to place and put in repair any roadway, street or high-

way through which its lines of pipes, wires, etc., may pass, but it is allowed to temporarily obstruct for a reasonable time any street in laying its lines and repairing the same.

Sec. 7. The private property of stockholders shall not be liable for the debts of the corporation.

Sec. 8. This act shall take effect from its passage.

Passed April 22, 1882.

AN ACT TO AMEND AN ACT, ENTITLED "AN ACT TO INCORPORATE THE COVINGTON ELECTRIC LIGHT COMPANY."

Sec. 719. (1.) *Be it enacted by the General Assembly of the Comonwealth of Kentucky*, That an act, entitled "An act to incorporate the Covington Electric Light Company," approved April the twenty-second, one thousand eight hundred and eighty-two, be, and the same is hereby, amended by striking out in the fifth line of the second section of said act, as it appears in volume the second of the printed acts of the General Assembly of the Commonwealth of Kentucky, passed at the regular session of the General Assembly which was begun and held in the city of Frankfort on Monday, November twenty-eighth, one thousand eight hundred and eighty-one, the words "and paid up."

Approved May 5th, 1884.

AN ACT TO AMEND THE CHARTER OF THE COVINGTON ELECTRIC LIGHT COMPANY.

Sec. 720. (1.) *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That the capital stock of the Covington Electric Light Company may, at any time, be increased by the board of directors to any sum not exceeding one million of dollars.

Approved May 10th, 1884.

APPENDIX B.

AN ORDINANCE TO ENABLE THE COVINGTON ELECTRIC LIGHT COMPANY TO EXERCISE THE FRANCHISES GRANTED BY ACT OF THE GENERAL ASSEMBLY OF KENTUCKY.

Section 1. [Repealed by ordinance of June 21, 1883.] *Be it ordained by the City Council of Covington,* That, for the purpose and with the rights and privileges, and under the restrictions set forth in the act of the General Assembly of Kentucky, approved April 22, 1882, entitled "An act to incorporate the Covington Electric Light Company," the said Covington Electric Light Company is hereby empowered to lay its pipes and mains through and along the streets and alleys of the City of Covington, under the supervision of, and in such reasonable manner as may be prescribed by, the committee of internal improvements of council.

Sec. 2. That the privileges hereby granted extend only to the laying of such pipes and mains as are necessary to supply this city and vicinity with light and heat and motive power, generated by electricity, steam or other artificial means, and shall not be so exercised as to injure or interfere with any sewer, gas pipe, telegraph or telephone pole or wire in said city.

Sec. 3. That the said privilege shall be so exercised as not permanently to obstruct the use of any street or alley, or to injure any public or private property, and is granted only on condition, that within such reasonable time, as shall be prescribed by said committee, the said company shall put in good repair all streets and public places, which may be torn up in the exercise of said privilege.

Sec. 4. This ordinance shall take effect from its passage and shall continue in force for twenty-five years from the 22d of April, 1882, *Provided,* however, that a non-user, for one year, or any abuse of the privilege herein granted, either by injury or obstruction to public or private ways or property, or by failure to replace streets or alleys in good repair, within a reasonable time, shall operate a forfeiture.

Sec. 5. Any or all repairs of streets, alleys, highways or other public property, and any and all removals of obstructions thereon, rendered necessary by the exercise of the privileges herein granted, may be made by the city at the expense of said company, and said privilege shall not be exercised until said company shall have signified its acceptance of the terms of this ordinance.

Passed and approved October 5, 1882. (P. 359.)

APPENDIX C.

AN ORDINANCE PRESCRIBING THE TERMS UPON WHICH STREETS, ALLEYS, AVENUES AND PUBLIC GROUNDS OF THE CITY OF COVINGTON, KENTUCKY, MAY BE USED BY INCORPORATED COMPANIES, FIRMS OR INDIVIDUALS, ENGAGED IN THE BUSINESS OF FURNISHING LIGHT BY MEANS OF ELECTRICITY.

Section 1. *Electrical companies may erect poles. Be it ordained by the City Council of Covington*, That any incorporated company, firm or individual, engaged in the business of furnishing light by means of electricity, may, with the consent of owners or lessees of the abutting property, erect and maintain the necessary number of poles, wires, supports, brackets, masts and such other fixtures as are necessary to the business of furnishing the city and its inhabitants with light by electrical currents, and may erect and maintain all such poles, wires, brackets, supports, masts and other fixtures as may be necessary, within said city, subject, however, to the rules and regulations herein prescribed, and to such other regulations and rules as the city council of Covington may hereafter ordain and prescribe for the protection of the interests of said city and its inhabitants. The aforesaid permission shall not be for a longer period than twenty-five years from the date of the grant of same in any case.

Sec. 2. *How poles should be erected—Under direction of committee on internal improvements and city engineer.* The poles, wires, supports, brackets, masts and such, that may be erected by any such corporation, firm or individual, other fixtures shall be placed and erected under the direction of the committee on internal improvements of the city council and city engineer, and shall be placed so as not to injure the support or the working of the lines of any telegraph or telephone, or other like company, previously erected on any individual or private property, or in any way injure, obstruct or inconvenience any person in his or her rights to the free use of such streets, alleys, avenues, etc., as public highways; nor shall any

pole or other support be so placed as to obstruct or inconvenience any public or private highway or passage way, or so as to injure or obstruct any sewer, water or gas pipe, and unless otherwise directed by the said committee on internal improvements, the said poles shall be placed under and along the sidewalks and within one foot of the curb line, and such brackets may project from the houses and such supports may be attached to the awning frames, and such lights overhang sidewalks as preferred by the adjoining proprietor, and with the consent of the property owners of said premises, all such erections, projections, attachments, and overhanging to be under the direction of the said committee on internal improvements and the city engineer.

Regulations concerning electric lights. Provided, however, That in no case shall the same interfere with the free passage and use of said sidewalk. Said lights may be suspended in mid-air and overhang streets, avenues, alleys and public grounds, but all said lights, as to their erection and suspension, shall be under the control of the said committee on internal improvements and the city engineer, and in no case be allowed to obstruct or interfere with the use of such streets, avenues and alleys as public highways.

Sec. 3. The rights and privileges granted in the preceding sections may be exercised by any such incorporated company, firm or individual, only in compliance with the following rules or regulations, to-wit:

CAPACITY OF FIXTURES.

Weight of arc lights. For arc lights, the conductor must have a weight, per running foot, at least equal to that of the wire (or parallel group of wires) constituting the main circuit of the magnetic regulator of the electric lamps, or of the armature of the machine employed, which ever of them is the largest.

Incandescent lights—Safe carrying capacity. For incandescent lights, whenever a connection is made between a larger and smaller conductor, at the entrance or within a building, some approved automatic device must be introduced in the circuit of the small conductor, whereby it shall be interrupted whenever the current, passing through it, is in excess of its safe carrying capacity. The safe carrying capacity of the wire is

that current which it will convey without becoming painfully warm when grasped in the closed hand.

INSULATION.

Insulation—Carrying electricity into buildings. All wires, machines and lamps to be so mounted and secured as to insure complete and continuous insulation with exception of those part (such as portions of the lamps or machines, for example) where insulation is impossible, and in this case accidental contact with exterior objects must be prevented by appropriate screens or the like. In no case must ground circuits be employed, or any portion of the system be allowed to come into conducting connections with the earth through water or gas pipes or otherwise. Exposed wires must be covered with at least two coatings, one of insulating material next the wire, of a thickness and material approved by the said committee on internal improvements and the city engineer, and another, outside of this, of a material calculated to protect the former from abrasion or other mechanical injury. When there is a possible exposure to water the first or second coating must be impervious to that fluid. Whenever electricity is carried into a building by conductors from an exterior source, a cutout must be provided at a point as near as possible to the entrance to such buildings. The outgoing and returning wires, for arc light, shall enter and leave each building at a point at least one foot from each other.

Wires passing through exterior walls—Special insulating tubes when required. Wires passing through the exterior walls of a building shall be firmly encased in substantial tubes of non-conducting material not liable to absorb moisture, and placed in such a manner as to prevent rain water from entering a building along the wires. In running along walls, wires shall be rigidly attached to the same by non-conducting fastenings (the wires themselves being well insulated), and shall not be hung from the projecting insulators in loose loops. All wires shall be placed at a distance of eight inches for arc lights, and two and a half inches for incandescent lights, from each other and wherever they approach any other wire or other conducting body, capable of furnishing another circuit of ground connections, they must be rigidly secured and separated from the same by some continuous solid non-conductor, such as dry wood, of

at least half an inch thickness. Whenever wires are carried through walls, floors or partitions in buildings they must be surrounded by a special insulating tube of substantial material. All joints in wires must be made in such a manner as to secure a perfect and durable contact, continuous wires (without joints) to be used as far as possible.

GLOBES.

Arc lights must be protected by globes. Arc lights must be protected by glass globes, enclosed at the bottom, to prevent the fall of ignited particles; and, where inflammable materials are present below the lamps, the wire netting must be added to keep the parts of the globe in case of its fracture from or during use. All broken or cracked globes to be at once replaced by perfect globes. In show windows, and places where inflammable articles are near the light, spark arresters shall be placed at the top of the globe.

AUTOMATIC SHUT OR CUT OFF.

Modification or checking of currents. Whenever a current of such high electro motive power is employed, that if concentrated on one lamp of a series, it might endanger the said lamp or its surroundings, then some improved automatic device must be employed, whereby the current shall be modified, interrupted or diverted. Means by which those in charge of the dynamo, electric machine, shall be warned of any excessive flow of current, or means whereby the same will be automatically checked, must in all cases be provided.

SEC. 4. *Must put in new approved devices.* Any corporation, firm or individual, operating under these articles, shall be required to adopt from any device which may be brought into public use, and which is approved and adopted by the board of fire underwriters, for the protection of the users of electric light against injury to person or property.

SEC. 5. *Change of location of lines or wires.* That the location of any such line or place, or the location of any poles, wires, supports, brackets, masts or other fixtures shall be changed by the said company, and at their own expense, to such other location as may be directed by the said committee on internal improvements; and, whenever the best interests of the city and

general public may require other different arrangements by said company using the streets for the purpose of lighting, or other purpose, by means of electrical currents, it shall be the duty of said company, at its own expense, to adopt such arrangements as the city council may prescribe.

Sec. 6. *May require wires to be placed underground.* Any corporation, firm or individual, operating under this ordinance, shall, when directed by the city council, carry all electric wires through underground pipes; and where the light is carried to poles, masts, brackets or other fixtures, the wires shall be conveyed to within six inches of where the light is exposed by such tubes or pipes as they (the city council) may require or designate.

Sec. 7. *Company must repair streets.* Any incorporated company, firm or individual, operating under this ordinance, shall, at their own expense, and in a manner to be approved by the said committee on internal improvements, restore to their former condition any streets, alleys, avenues, or public grounds, or squares, that may be taken up, excavated or obstructed, in any way, by the erection of poles and masts, or the laying of underground pipes; and all such excavating made necessary by the erection of poles or masts, or the laying of underground pipes, shall be made under the supervision of, and subject to the control of, the said committee on internal improvements.

Sec. 8. *Provisions for coming within the operations of this ordinance.* Whenever any incorporated company, firm or individual shall wish to operate under the provisions of this ordinance, it, or they, shall make a written application to the city council, stating their desire to operate under this ordinance, and the time for which they desire to operate, not exceeding twenty-five years; and shall accompany said written application by a bond in the penal sum of twenty thousand dollars, with good and sufficient security, conditioned to keep and perform all the terms and conditions of this ordinance, and to comply with all the rules and regulations herein provided and to save the city harmless from all loss, costs, damages, fees and expenses, of every kind, the said city may sustain or be put to, in any manner, by reason of the grant of the privileges herein provided for, or by reason of the failure of said incorporated company to comply with the terms, provisions, conditions, stipu-

lations and regulations of this ordinance, or any one or more of them, and if the said council are then satisfied that permission shall be granted to said incorporated company, firm or individual, and if the bond presented shall be satisfactory to said council, the said council shall approve said bond and shall by ordinance or resolution, grant permission to said applicant to operate under the provisions of this ordinance.

Sec. 9. *Non-user or abuse of the privileges operates as a forfeiture.* The non-user for one year of the privilege granted, or any abuse of the privileges herein granted, either by injury or obstruction to public or private ways or property, or by failure to replace streets or alleys in good repair within a reasonable time, shall operate as a forfeiture of the privileges, that may be granted hereunder, to any corporation, firm or individual.

Sec. 10. *Repairs may be made by the city at the expense of company.* Any and all repairs of streets, alleys, highways or other public property, and all removal of obstructions thereon, rendered necessary by the exercise of the privileges herein granted, may be made by the city, at the expense of the corporation, firm or individual, exercising the privileges herein granted.

Sec. 11. *Repealing clause.* An ordinance passed by the city council October 5, 1882, entitled, "An ordinance to enable the Covington Electric Light Company to exercise the franchises granted by the act of the General Assembly of Kentucky," is now, and is hereby repealed.

Passed and approved June 21, 1883.

APPENDIX D.

AN ORDINANCE TO AMEND AN ORDINANCE PASSED JUNE 21, 1883, ENTITLED "AN ORDINANCE PRESCRIBING THE TERMS UPON WHICH STREETS, ALLEYS, AVENUES, AND PUBLIC GROUNDS MAY BE USED BY INCORPORATED COMPANIES, FIRMS, OR INDIVIDUALS ENGAGED IN THE BUSINESS OF FURNISHING LIGHT BY MEANS OF ELECTRICITY.

Section 1. *Be it ordained by the City Council of Covington,* That any incorporated company, firm or individual, engaged in business or organized for the purpose of furnishing light by means of electricity, may subject, in all respects, to the provisions, stipulations and conditions of the said ordinance passed by this council June 21, 1883, and entitled an ordinance prescribing the terms upon which streets, alleys, avenues, and public grounds, of the city of Covington, Ky., may be used by incorporated companies, firms or individuals engaged in the business of furnishing light by means of electricity in addition to the modes in said ordinance provided for furnishing light by means of electricity, lay its pipes, mains or other conduits under the streets, alleys, and public highways of the city of Covington for the purpose of carrying on its business.

Sec. 2. *Bond; damages, how paid.* The bond to be given by any such company, firm, or individual, shall be in the sum of ($20,000), as provided in said original ordinance, to which this is an amendment, and in addition to these conditions, stipulations and provisions to be contained in said bond, as provided in said original ordinance, the said bond shall contain the further conditions that the said company, firm or individual accept the provisions of said ordinance as now amended, shall restore to their former conditions and put in repair at his or their expense any streets, alleys, avenues, highways, public grounds, or squares, that may be taken up, excavated or obstructed, in any way, by the laying of said pipes, mains or other conduits under said streets, alleys, avenues, etc., and that it will pay to the city all damages, costs or expenses said city may incur, sustain, or be compelled to pay by reason of taking up, excavat-

ing or obstructing of any of said streets, alleys, avenues, highways, etc., in the laying of said pipes, mains, or conduits.

Sec. 3. *Other property not to be damaged.* Any company, firm, or individual, accepting the provisions of said ordinance as now amended, shall not interfere with or damage in any way, the sewers, gas and water pipes now laid, or that may hereafter be laid, in said city, and the work of laying said pipes, mains, or conduits, under the streets, alleys, public highways, etc., of the said city, by such company, firm, or individual, and the putting of the same in proper repair, as herein provided, by any such company, firm, or individual, shall be done under the supervision, and subject to the direction and approval, of the committee of internal improvements of this council and the city engineer of the city of Covington, Ky.

Sec. 4. This ordinance shall take effect and be in force from and after its passage.

(Q.) Approved July 3, 1884.

APPENDIX E.

COUNCIL RESOLUTION NUMBER 419.

[Report of Committee of December 27, 1897.]

Be it Resolved, That the city solicitor and the law committee be instructed to give their opinion at the next regular meeting by what right the Suburban Electric Company is operating in this city.

Passed November 29, 1897.

December 27, 1897. On motion of Mr. ——————— the rules were suspended for the purpose of offering the following report:

To the General Council, Gentlemen—Your committee on law and the solicitor, to whom was referred C. R. No. 419 Resolution in reference to the authority of the Suburban Electric Company to do business in the City of Covington, respectfully as follows:

On the 22d day of April, 1882, the Legislature of Kentucky passed "An Act to Incorporate the Covington Electric Light Company." Said company to have a capital stock of not to exceed one hundred and fifty thousand dollars. Said company was to have the right to furnish and supply the City of Covington and its inhabitants and persons and corporations located near said city with light and motive power generated by electricity, steam or other artificial means, and to charge such prices as may be agreed upon between the company and the individuals and corporations contracting therefor.

Said company was given the privilege, subject to the regulations of the city authorities, to lay its pipes and mains; erect its poles, wires, etc., along the streets and highways of the City of Covington; provided, it in no way permanently obstructed the use of the same to the public or individual.

On April 9, 1900, the Legislature of Kentucky passed "An Act to Incorporate the Edison Electric Illuminating, Heat and Power Company, of Newport, Kentucky," with a capital stock of not to exceed two hundred thousand dollars. The nature of the business was to erect, operate and maintain a general

system of electric dynamos, and other apparatus for the purpose of generating, furnishing and selling electricity for light, heat, power, and any other purpose that the electric current may be applied to in the City of Newport, and to furnish said city and its inhabitants, and other persons, corporations and municipal corporations, located in or near said city, with light, heat and power by the electric current.

On April 17, 1900, the Legislature of the State of Kentucky passed "An Act to Incorporate The Citizens Electric Light Company." This company has authority to furnish electricity, etc., in Dayton, Campbell County, Kentucky.

On the 11th day of April, 1894, all the above-mentioned companies were consolidated, under the Kentucky statute authorizing consolidation, under the name of The Suburban Electric Company, with a capital stock of two hundred and fifty thousand dollars. Said company retained the rights and privileges granted in each of the above-mentioned charters. The articles of consolidation were filed in the clerk's office in Newport, Kentucky, and with the Secretary of State of Kentucky in Frankfort, Kentucky.

On June 21, 1883, the general council passed an ordinance in reference to the use of streets by corporations furnishing electricity, in which ordinance it was provided that a bond of twenty thousand dollars should be given conditioned that said company should comply with the terms of said ordinance.

It seems that this ordinance was never enforced as to the Covington Electric Company, but inasmuch as the said ordinance has never been re-enacted since the adoption of the present charter, it is at this time void and inoperative.

We are of the opinion that said company has the right to do business in the City of Covington by reason of the above legislative enactments, subject to the regulation of the city authorities, and lay its pipes and mains, erect its poles, etc., along any street in the City of Covington, according to the terms of the legislative enactments of April 22, 1882.

W. H. McLEAN,
JAMES H. GAHAN,
JAMES J. MALONEY,
Committee on Law.
WM. McD. SHAW,
City Solicitor.

FILE COPY.

Office Supreme Court
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JAMES H. McKENNEY,
Clerk

No. 246

U. S. SUPREME COURT

October Term, 1903.

CHARLES H. SHAW, Trustee:
The Union Light, Heat and Power Co.,
The Suburban Electric Co.,
Appellants,

vs.

THE CITY OF COVINGTON, et al.,
Defendants in Error.

MOTION TO ADVANCE.

F. J. HANLON,
City Solicitor.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

Chas. H. Shaw, Trustee:
The Union Light, Heat and Power Co.,
The Suburban Electric Co.,
Appellants.
vs.
The City of Covington *et al.*,
Defendants in Error.

No. 649.

MOTION TO ADVANCE.

The City of Covington, Kentucky, and William A. Johnson, Mayor of the City of Covington, now come and move the Court that the above styled cause be advanced for hearing at as early a date as may be convenient and proper under the rules of court.

The matter involved in said cause is the claim of the City of Covington, Kentucky, of the right to construct a municipal electric light plant to light the streets and public buildings of said city.

The right to construct said plant is claimed by said city under and by virtue of its charter (charters of cities of the second class in Kentucky), and being a certain act of the Kentucky Legislature, approved March 19th, 1894.

Said act in part provides:

> "The General Council shall have power by ordinance to provide by themselves or through others for lighting the streets, public places and buildings, and furnishing light to the inhabitants, and to regulate the quality and quantity of the light, and the method, time of, and appliances for furnishing the same; to compel any and all light companies or persons furnishing light to change and re-locate gas mains, or pipes, or poles, electric wires and conduits for electric wires, place those above the surface of the ground, under it, to change the method of conveying the light, and generally to do things conducing to the safety and comfort of the inhabitants in the premises."

During the year 1900 the City of Covington desired to erect a municipal electric light plant to light the streets and public buildings of said city. The question "as to whether or not the city should issue bonds to the amount of $75,000.00 for the construction of said light plant" was submitted to a vote of the people during said year, and said proposition was voted upon favorably by a majority of the citizens of Covington, and the General Council of said city was about to issue said bonds when it was enjoined by the appellants herein, and prevented from issuing said bonds and constructing said light plant.

The right of the City of Covington to construct said municipal electric light plant is resisted by the appellant, the Union Light, Heat and Power Company, claiming that it has the exclusive franchise and privilege of furnishing electric light to said city until April 22d, 1907.

Said Union Light, Heat and Power Company claims that it received said exclusive franchise by virtue of a consolidation effected with a constituent company, known as the Covington Electric Light Company. Said Covington

Electric Light Company was incorporated by an act of the Legislature of Kentucky, approved April 22d, 1882, and said company was given the exclusive right to furnish electric light to the City of Covington, and its inhabitants, for a period of twenty-five years from said date. Subsequently said Covington Electric Light Company, together with two other constituent electric light companies, in 1894, consolidated their interests and formed a new corporation, known as the Suburban Electric Company, and by the articles of incorporation of said Suburban Electric Company, the said Covington Electric Light Company attempted to pass to said Suburban Electric Company (by virtue of said consolidation) the exclusive privilege which was granted to it in 1882 as aforesaid. Subsequently the said Suburban Electric Company sold out its property interests to the North American Light Company (a company incorporated under the laws of New Jersey), and by said sale attempted to assign and transfer to said North American Light Company the exclusive privilege aforesaid which was granted to the said Covington Electric Light Company in 1882. Subsequently the said North American Light Company attempted to assign, transfer and sell said exclusive franchise aforesaid (which was granted originally to the Covington Electric Light Company) to the appellant herein, the Union Light, Heat and Power Company, the real party in interest herein, which is now claiming the exclusive right and privilege to furnish electric light to the City of Covington and the inhabitants thereof, until the year 1907.

This case was tried upon its merits in the United States Circuit Court below, and on the 14th day of October, 1902, judgment was rendered dismissing said bill of complaint, and dissolving said injunction. The appellants prayed an appeal to the United States Circuit Court of Appeals for the Sixth

District, and asked for an order continuing the injunction in force pending an appeal to said Circuit Court of Appeals. The appeal was granted, and said injunction continued in force pending said appeal to said Circuit Court of Appeals over the objection of the appellee herein, City of Covington. Subsequently the appellants appeared in the Circuit Court of Appeals and dismissed said appeal, and procured another appeal from the Judge of the Circuit Court below to this court, and also procured an order from the Judge of the Circuit Court below, continuing the injunction in force pending said appeal to this honorable Court.

The reasons for this application are: That the matters involved herein are of great public interest to the State of Kentucky, and the citizens and taxpayers thereof. It is important to all municipalities in the State of Kentucky, and the citizens and taxpayers thereof, and to all private corporations, that the law as to exclusive franchises and privileges in Kentucky should be speedily settled.

Wherefore the appellees, City of Covington, and William A. Johnson, Mayor, pray that this cause be advanced and heard at as early a date as may be convenient and proper under the rules of court. The injunction is still in force and effect, preventing appellee city from issuing said bonds and constructing said municipal electric light plant.

F. J. HANLON,
City Solicitor and Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1902.

No. 649.

CHAS. H. SHAW, TRUSTEE, Etc., Appellant.

vs.

THE CITY OF COVINGTON, et al., Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, AT COVINGTON, TO THE SUPREME COURT OF THE UNITED STATES.

Motion to Dismiss Appeal for want of Jurisdiction.

The appellees, City of Covington, and Wm. A. Johnson, Mayor of the City of Covington, now come and move the court to dismiss the appeal granted herein, by the United States Circuit Court for the Eastern District of Kentucky, on December 23, 1902, for the following reasons:

The question at issue herein is, whether or not the appellant has the exclusive franchise of furnishing electric light to the City of Covington. The City of Covington desired to build a municipal electric light plant to light the streets and public buildings of the city. The question was submitted to the voters of the city, as to whether or not the city should issue bonds for the erection of said light plant. Said proposition, to issue said bonds, carried by a majority of the votes of the citizens of Covington, and the general council of said city was about to issue said bonds when it was en-

joined by the appellant herein, as trustee of the Suburban Electric Company, said company claiming the exclusive privilege of furnishing electric light to the city, until April 22, 1907.

Said Suburban Electric Company claims that it received said exclusive right by virtue of the consolidation with a constituent company called The Covington Electric Light Company. Said Covington Electric Light Company was incorporated by an act of the Legislature, approved April 22, 1882, and said company was given the exclusive right to furnish electric light to the City of Covington, and its inhabitants, for a period of twenty-five years. Said Covington Electric Light Company, together with two other constituent electric light companies, in 1894, consolidated their interests under the name of The Suburban Electric Company, and said Covington Electric Company attempted to pass, by virtue of said consolidation, the exclusive privilege which the Legislature had granted to it in 1882.

This case was tried upon its merits in the United States Circuit Court below, and judgment was rendered dismissing the petition and dissolving the injunction, on the 14th of October, 1902, and the appellant herein prayed an appeal to the United States Circuit Court of Appeals, for the Sixth District, which appeal was granted, and on the same day the appeal bond was fixed at one thousand ($1,000) dollars, and an order entered continuing the injunction, heretofore granted, in force, pending said appeal.

On the same day a petition for appeal was filed by the appellants, and an assignment of errors was also filed on the same day, and on October 14, 1902, a bond on appeal to the Circuit Court of Appeals was filed, all of which is set forth in the record herein, and on the same day, to-wit: October 14, 1902, citation issued and was served upon the appellees

herein, admonishing them to appear at a session of the United States Circuit Court of Appeals, for the Sixth Circuit, to be holden at the City of Cincinnati, at said circuit, on the 12th day of November, 1902, and to show cause, if any there be, why the judgment rendered against the plaintiff in error should not be corrected.

On November 10, 1902, an extension of time of thirty days was granted by the Circuit Court to allow the plaintiffs in error to file the transcript of the proceedings in the Circuit Court of Appeals for the Sixth District, and on November 11, 1902, the citation issued herein on October 14th, was returned and filed, showing service upon the appellees herein.

Said transcript of the proceedings of the United States Circuit Court, was taken by the appellants herein, and filed in the United States Circuit Court of Appeals, for the Sixth Circuit, and on December 15, 1902, a certified copy of an order of the Circuit Court of Appeals for the Sixth Circuit was filed in the United States Circuit Court, for the Eastern District of Kentucky. Said copy was and is in words and figures as follows, and was entered by the Circuit Court of Appeals on December 13, 1902:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

CHAS. H. SHAW, TRUSTEE IN BANKRUPTCY OF THE SUBURBAN ELECTRIC COMPANY,

VS.

THE CITY OF COVINGTON, AND WM. A. JOHNSON, MAYOR OF THE CITY OF COVINGTON.

In this cause the motion heretofore entered by the appellant for an order dismissing this appeal for lack of jurisdiction thereof in this court, and without prejudice and for

leave to withdraw the record herefrom, came on this day to be heard, and was argued by counsel for the appellant in support thereof, and by counsel for appellee, in opposition thereto, and upon consideration thereof, it appearing to this court, that the said appeal was taken to this court by inadvertence, it is ordered that so much of said motion as prays for leave to dismiss said appeal be granted, and the said appeal is therefore now dismissed, and it appearing that the transcript on said appeal has now been filed, and the cause docketed in this court, it is further ordered that so much of said motion as prays for leave to withdraw the record from this court be denied.

And it is also further ordered that the motion herein filed by the appellee on the 11th day of December, instant, for an order affirming the decree of the Circuit Court in this cause, be denied.

On December 13, 1902, another appeal was granted to appellant by the United States Circuit Court for the Eastern District of Kentucky, to the Supreme Court of the United States, and it was ordered that the injunction heretofore granted remain and continue in full force and effect, pending said appeal by complainant to the Supreme Court of the United States. This appeal was granted after the Circuit Court of Appeals had dismissed the appeal which was pending in said court.

On December 19, 1902, the appellees filed in the court below a motion to set aside the order entered as of December 13, 1902, continuing the injunction in force and effect, pending the appeal by complainant to the Supreme Court of the United States and to reconsider the order granting an appeal to the Supreme Court, and on December 23, 1902, said court overruled said motion, and on the same day,

to-wit; December 23, 1902, said Circuit Court below granted appellant an appeal to the Supreme Court of the United States, and fixed the appeal bond at one thousand ($1,000) dollars.

Appellees now come and move the court to dismiss the appeal herein, because the United States Circuit Court for the Eastern District of Kentucky, has no power or authority in law to grant an appeal to this honorable court, after granting an appeal to the United States Circuit Court of Appeals, for the Sixth District, and said appeal being there dismissed.

F. J. HANLON,

Attorney for Appellees.

[redacted]

[redacted]

[redacted]

22169

SUPREME COURT OF THE UNITED STATES

October Term, 1902.

No. 649.

CHAS. H. SHAW, TRUSTEE, Etc., Appellant.

vs.

THE CITY OF COVINGTON, et al., Appellees.

BRIEF FOR APPELLEES ON MOTION TO DISMISS FOR WANT OF JURISDICTION.

For the purposes of this motion, I will briefly state the nature of this action.

On December 3, 1900, the appellant filed its bill of complaint in the United States Circuit Court for the Eastern District of Kentucky, at Covington, seeking to enjoin the City of Covington from erecting a municipal electric light plant to light the streets and public buildings of the City of Covington, Kentucky; the complainant, in substance, alleging "that it has the exclusive franchise and right to furnish electric light to the City of Covington and the inhabitants thereof until April 22, 1907." The complainant alleges farther as a cause of action "that the Suburban Electric Company is a corporation created and existing by the consolidation of the Covington Electric Company of Covington,

Kentucky, The Suburban Electric Illuminating, Heating and Power Company of Newport, Kentucky, and The Citizens' Electric Light Company of Dayton, Kentucky, and that said several constituent corporations, and the stockholders thereof, effected a consolidation of same on April 11, 1894, under the name of 'The Suburban Electric Company,' the complainant herein; that by an act of the legislature of Kentucky, approved April 22, 1882, a charter was granted to one of the aforesaid constituent corporations, The Covington Electric Company of Covington, Kentucky, giving to said company the exclusive franchise of furnishing electric light to the City of Covington, and the inhabitants thereof, for twenty-five years." The complainant claims that by virtue of the consolidation aforesaid that it succeeded to said exclusive franchise of said company, which would expire on April 22, 1907. Subsequently, The Suburban Electric Company attempted to assign and transfer all its property, including said exclusive privilege, to The North American Light Company, a corporation organized and existing under the laws of New Jersey, and that thereafter said North American Light Company attempted to assign and transfer to The Union Light, Heat and Power Company, a corporation of Covington, Kentucky, the said exclusive privilege hereinbefore described. The Union Light, Heat and Power Company of Covington, Kentucky, is now the real party in interest and the complainant herein asserting said exclusive privilege.

The City of Covington desired to erect its own municipal electric light plant, and submitted to the people of the city a proposition to issue bonds to the amount of seventy-five thousand ($75,000.00) dollars for the purpose of erecting and constructing said plant. The people voted in favor of said bond issue, and the city was about to advertise said bonds

for sale when this suit was instituted, and an injunction granted, thus preventing the city from selling said bonds and erecting said light plant.

This case was tried upon its merits in the court below, and judgment was rendered dismissing the petition and dissolving the injunction on the 14th day of October, 1902. On the same day an appeal was prayed by the complainant to the United States Circuit Court of Appeals for the Sixth District, which appeal was granted, and on the same day the appeal bond was fixed at one thousand ($1,000.00) dollars, and an order entered continuing the injunction heretofore granted, in force, pending said appeal.

PROPOSITION DISCUSSED.

The proposition I desire to discuss to the court on this motion is, "that the appeal taken by the complainant to the United States Circuit Court of Appeals for the Sixth District was perfected by the complainant, and the record lodged in said Circuit Court of Appeals, and that when said appeal was perfected to the Circuit Court of Appeals, the Circuit Court for the Eastern District of Kentucky had no further jurisdiction to grant the appellant another appeal to this court."

ARGUMENT.

The first question asked by the court is, "Has this court jurisdiction?" If it has not, it will on an examination of the record and the questions involved, dismiss the appeal, on its own motion, without any limitations or qualifications.

The court will observe, from the record herein, that the appeal to the Circuit Court of Appeals was fully perfected; the appeal bond was executed, petition for appeal was filed

by appellants, and an assignment of errors was filed; citation issued and served upon the appellees herein, and a transcript of the record was filed in the clerk's office of the Circuit Court of Appeals.

After appellants had taken their appeal to the Circuit Court of Appeals, they realized for the first time that that court had no jurisdiction, under the authority of the case of the City of Owensboro *v.* The Owensboro Water Works Company, reported in 115 Federal Reporter, page 318, because in the case at bar, the contention of appellant was and is, "that certain laws of the State of Kentucky have violated the contract between the appellant herein and the State of Kentucky," and because there is no diversity of citizenship, both parties hereto being residents of the State of Kentucky.

The appellants recognizing, after they had perfected their appeal to the Circuit Court of Appeals, that said court had no jurisdiction, filed a motion in said court to dismiss their appeal for lack of jurisdiction, and without prejudice, and for leave to withdraw the record therefrom. The Circuit Court of Appeals sustained said motion to dismiss said appeal, and refused to allow the transcript of the record to be withdrawn from said court.

After said appeal was dismissed by the Circuit Court of Appeals, the appellants applied to the judge of the Circuit Court, for the Eastern District of Kentucky, at Covington, to grant them another appeal to this court, and they filed their petition for appeal and an assignment of errors, and the question now before the court is, "Did the judge of the Circuit Court have the power to grant appellants a second appeal to this court?"

My contention is, that after the judge of the Circuit Court granted appellant an appeal to the Circuit Court of

Appeals, and signed the citation, and the appeal bond was executed, and the transcript of the record lodged in the Circuit Court of Appeals, that his jurisdiction of the case was at an end, and he had no farther control over the case.

The Circuit Court of Appeals could not dismiss the appeal of the appellants without prejudice to their right to apply to the Circuit Court again for another appeal to this court, because the jurisdiction of the Circuit Court was at an end.

This principle seems to be established beyond any question of doubt by decisions of several of the Circuit Courts and by this court.

> "After an appeal has been allowed, and a supersedeas bond is taken, either during or after the term, jurisdiction as to all matters—certainly those of substance—determined by the decree is transferred to the court to which the appeal goes."

Same:

> " Plaintiff brought suit to have a certain claim declared an equitable lien on the property of a railroad company prior to the lien of two mortgages on the same property executed to defendant. Receivers were appointed by the court in accordance with plaintiff's prayer, and took charge of the property under order of court. Subsequently the court declared plaintiff's claim a lien on the property, but subordinate to the mortgages of which it decreed a foreclosure. Plaintiff appealed from the whole decree and gave a supersedeas bond; and, after the expiration of the term in which this decree was rendered, the court, at the instance of defendant, modified its decree so as to order the property in the receivers' hands to be turned over, subject to the court's supervision, and pending the appeal, to the

defendant, who was the trustee under the mortgages, in accordance with the condition in the mortgages that, upon default of payment, the trustee might take possession of the mortgaged property. Held, the court had no power over the decree after the expiration of the term and after the appeal had been perfected, and that the attempted modification was a substantial alteration."

Morgan's Louisiana & T. R. & S. S. Co. *v.* Texas Central Ry. Co., etc., Farmer's Loan and Trust Co., Trustee, *v.* Same (Circuit Court N. D. Texas, October 28, 1887), 32 Federal Reporter, 525.

"A removal of a case to the Circuit Court of Appeals by writ of error ends the jurisdiction of the lower court; and as it cannot entertain a motion to vacate its judgment, in such case after the writ is granted, a second writ of error will not lie to review its denial of such motion."

Citizens' Bank *v.* Farwell, 56 Federal, 539–570.

"It is the rule in federal courts that when all the steps necessary to perfect an appeal have been properly taken, the action is within the control of the appellate court, and a motion for substitution of the appeal bond must be addressed to that court."

Same:

"On the 21st day of January, 1899, The City Trust, Safe Deposit and Surety Company of Philadelphia, the surety on the bond, so tendered by the defendant and accepted by the court, applied to the court for an order granting the surety permission to substitute another bond for such bond so before received, upon the ground that the surety did not contemplate issuing a bond whereby the liability of the surety would extend to the costs and damages directed to be paid by the decree of the trial court. The motion is

denied, without passing upon the merits of the application, because the action has been transferred from this court to the Circuit Court of Appeals, and that court has now exclusive cognizance of the matter."

Morrin v. Lawler. (Circuit Court E. D. New York, January 28, 1899). 91 Federal 693.

In the case of the Providence Rubber Company v. Chas. Goodyear, etc., reported in 73 U. S. 153–157, (18: 762) this court held:

"In equity cases the appellate jurisdiction of this court attaches upon the allowance of the appeal. In order to make the appeal operate, as a supersedeas it is necessary for the appellant to give good and sufficient security for the prosecution of the appeal, and for all costs and damages that may be adjudged against him. This security is usually given by bond, with one or more sureties, and the 22d section of the Judiciary Act requires that it be taken by the judge who signs the citation on appeal. It is not required that the security shall be in any fixed proportion to the decree. What is necessary is, that it be sufficient and when it is desired to make the appeal a supersedeas, that it be given within ten days from the rendering of the decree. The question of sufficiency must be determined in the first instance by the judge who signs the citation, but after the allowance of the appeal, this question as well as every other in the case, becomes cognizable here."

"The power of a justice of a court below over the appeal to this court, and over the security, in the absence of fraud, is exhausted when he takes the security and signs the citation. From that time the control of the supersedeas, as well as the appeal, is transferred to this court."

Same. By the court:

"When the original bond of $1,000 was accepted by the justice and the citation signed, an appeal was allowed and security taken, which operated as a supersedeas. That transferred the jurisdiction of the suit appeal to this court. As this allowance was the act of the justice of the court, and not of the court itself, no such question is presented as was decided in Goddard (Phillips) v. Ordway, 101 U. S. 745 (XXV. 1040), where we held that if the allowance was the judicial act of the court in term time, it might, like any other order in the suit, be set aside on proper showing during the term. The power of the justice over the appeal and the security, in the absence of fraud, was exhansted when he took the security and signed the citation. From that time the control of the supersedeas, as well as the appeal, was transferred to this court, and even here, as we held in Jerome v. McCarter, 21 Wall., 17 (88 U. S. XXII. 515), in the absence of fraud, the action of the justice or judge in accepting the security, within the statute and within our rules adopted for his guidance, was final, so far as it depended on facts existing at the time the security was accepted. It follows that the supersedeas, which resulted from the taking of the security on the 29th of June, is still in force and has never been vacated. Consequently, the court below is without power at this time to proceed with the execution of the decree appealed from, and we will presume that upon an intimation of that kind from us, it will not attempt to do so."

Draper v. Davis et al., 102 U. S. 370–371 (26:121).

This doctrine laid down in the above case was confirmed and upheld by this court in the case of Benjamin U. Keyser, etc., *v.* Henry H. Farr et al., reported in 105 U. S.,

pages 265–267 (26 : 1025), wherein this court held and decided that:

> "After the acceptance of the bond for an appeal and the docketing of the case in this court, the jurisdiction of the court below is gone."

These authorities seem to me to be conclusive of the proposition which I am discussing, to-wit: "That after the judge of the Circuit Court granted the appeal to the Circuit Court of Appeals, and after the appeal bond was executed, and he had signed the citation, and the transcript of the record was lodged in the clerk's office of the Circuit Court of Appeals, his jurisdiction of the case was at an end, and he was thus deprived of any further control over the case, and that said case upon all questions passed from his hands into the Circuit Court of Appeals for all purposes." If this is true, and the proposition seems to be sustained by numerous decisions of this court and several of the Circuit Courts, it necessarily follows that the judge of the United States Circuit Court for the Eastern District of Kentucky had no jurisdiction or power to grant appellants this appeal herein to this Honorable Court, and if this is true, it must follow that the appeal is not properly before this court, and it has no jurisdiction to entertain the same.

It is respectfully submitted that the motion to dismiss the appeal for want of jurisdiction should be sustained and the appeal dismissed.

All of which is respectfully submitted.

F. J. HANLON,

Solicitor for Appellees.

AUTHORTIES CITED.

Morgan's Louisiana & T. R. & S. S. Co. *v.* Texas Cent. Ry. Co., etc.; Farmer's Loan and Trust Co., Trustee, *v.* Same, 32 Federal, 525.

Citizens Bank *v.* Farwell, 56 Federal, 539–570.

Morrin *v.* Lawler, 91 Federal, 693.

Providence Rubber Co. *v.* Goodyear, etc., 73 U. S. 153–157 (18 : 762).

Draper *v.* Davis et al., 102 U. S. 370–871 (26 : 121).

Keyser *v.* Farr et al., 105 U. S. 265–267 (26 : 1025).

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SUPREME COURT OF THE UNITED STATES.

October Term, 1902.

No. 649.

CHAS. H. SHAW, TRUSTEE, Etc., Appellant.

vs.

THE CITY OF COVINGTON, et al., Appellees.

BRIEF FOR APPELLEES, ON MOTION TO AFFIRM.

I believe it is the practice of this court, that there may be united with a motion to dismiss an appeal, a motion to affirm, and that where the appellee has a color of right to dismissal, motion to affirm will be considered. (Whitney v. Cook, 9 Otto, 607; Hinckley v. Morton, 13 Otto, 764.)

This court, as I understand, will sustain a motion to affirm, if the appeal is taken for delay only. Micas v. Williams, 14 Otto, 556; The S. C. Tryon, 15 Otto, 267), or the questions of law have already been decided here. (Swope v. Leffingwell, 15 Otto, 3.)

I believe, that a consideration of the record herein will show that this appeal was taken for delay only, and in order to prevent the appellee, City of Covington, from erecting its own municipal electric light plant until the expiration of the charter granted to the old Covington Electric Company, which expires in 1907. The object, I think, is plain that it is the desire of the appellant to keep this case in court until such time.

The question, as to whether or not a corporation can, by consolidation with another company, pass an exclusive franchise, such as is in question here, has been settled beyond a shadow of doubt by many decisions of this court. The question as to whether one corporation can sell an exclusive privilege such as is in question here, to another corporation, without express authority from the Legislature so to do, is, I take it, settled by many decisions of this court, beyond any question of doubt. The record herein will show that the old Covington Electric Company had no power and was not empowered by the Legislature of the State of Kentucky to sell or assign said exclusive franchise, and in the absence of such power said company cannot sell, either by consolidation with another company, or by sale to another company, such a valuable privilege.

This doctrine has been confirmed by this court in the case of Shields v. Ohio, 95 U. S. 319, (24:357), wherein this court has held:

> "When the consolidation was completed, the old corporations were destroyed, a new one was created, and its powers were granted to it in all respects, in the view of the law, as if the old companies had never existed, and neither of them had ever enjoyed the franchises so conferred."

In Maine Central R. R. Co. v. State of Maine, 96 U. S. 499–513, (24:836), wherein the question was involved, as to whether an "exemption from taxation", held by a corporation passed to a consolidated company by virtue of the consolidation. This court in deciding this case, held:

> "So long as these companies were distinct corporations, only the tax thus prescribed could be imposed upon them. But when they were merged in the new

corporation, their distinct corporate existence ceased, except so far as their existence might be necessary for the protection of their creditors or mortgagees, or those of the new corporation."

This doctrine was confirmed in the case of the Atlantic & Gulf R. R. Co. v. State of Georgia, 98 U. S. 359, (25:185); also in the case of Keokuk & Western R. R. Co. v. State of Missouri, 152 U. S. 301, (38:450), Yazoo & Miss. Valley R. R. Co. v. Wirt Adams, 180 U. S. 2, (45:396.)

These cases and many others I could cite to the court, decide conclusively, that an exclusive franchise or privilege of the nature such as is claimed by appellant herein, cannot be passed to another corporation by virtue of a consolidation. Neither can an exclusive franchise, such as is claimed by appellant herein, be transferred or sold for a consideration by one corporation to another, unless expressly authorized by the Legislature of a state so to do. An inspection of the record herein will show, that neither in the act creating the old Covington Electric Company, or in the articles of incorporation of the Suburban Electric Company, that neither of said companies was given any power, or have any power, to sell or assign the exclusive franchise in question herein. I take the law to be well settled by this Honorable Court, upon this proposition, "that unless expressly authorized by a Legislature so to do, a corporation cannot sell or assign such an exclusive franchise."

This has been decided in many cases by this court, to which I will refer to a few.

In Beman v. Rufford, 1 Sim. (U. S.) 550; Winch. v. R. R. Co., 13 L. ffi. Eq. 506, the court held and decided:

"A lease by a railroad company of all of its road, rolling stock and franchises, for which there is no authority given in its charter, is ultra vires and void.

"The franchises and powers granted to such corporations, are in a large measure designed to be exercised for the public good, and this exercise of them, is the consideration of the public grant. Any contract by which the corporation disables itself to perform those duties to the public, or attempts to absolve it from their obligations, without the consent of the state, is a violation of its contract with the state, and is forbidden by public policy, and is, therefore, void."

"A law providing that the purchasers under a foreclosure sale of a railroad should forthwith be a corporation and 'should succeed to all such franchises, rights and privileges as would have been had by the first company, but in such sale and conveyance' did not confer an exemption from taxation to the new corporation formed by the purchaser under the foreclosure sale. The new corporation does not take any exemption or immunity from taxation, which belonged to the old company, although this was one of the franchises of the first company." Chesapeake & Ohio R. R. Co. v. Miller, 114 U. S. 176.

In Memphis & Little Rock R. R. Co. v. Berry et. al., 112 U. S., 609, (28:837), this court decided:

"An exememption from taxation must be construed to have been a personal privilege of the very corporation, specifically referred to, and to have perished with that, unless, the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor."

This doctrine was reiterated and confirmed in the case of Wm. W. Gibbs v. The Consolidated Gas Co. of Baltimore City, decided in 130 U. S. 396, (32:979), wherein this court held:

"A corporation cannot disable itself by contract from performing the public duties which it has undertaken, nor, by agreement, compel itself to make public accommodation subservient to its private interests."

To the same effect see case of Oregon Railway & Navigation Co. v. The Oregonian Railway Company, 130 U. S. 1, (32:837), wherein this court, after an elaborate opinion, in which it reviewed the former opinions and decisions of the court upon said proposition, sustained the doctrine, "that a corporation has no right to sell or transfer its franchise unless specially authorized by law so to do."

The court, in this case held further:

"The words 'successors and assigns' which was embraced in the charter of said company did not authorize said company to transfer and sell its exclusive franchise."

"A grant to each of two new corporations of the powers, rights and capacity, which had been granted to a corporation which they succeeded does not confer on the new company the exemption conferred upon the original company from legislation, chang the rates of toll."

Covington & Lexington Turnpike Road Co. v. A. P. Sanford, 164 U. S. 578.

To the same effect see case Minn. & St. L. R. R. Co. et. al. v. Gardner, 177 U. S. 330, (44:793), and also L. & N. R. R. Co. v. Com'th Kentucky, et. al., 161 U. S. 677, (40:849), wherein this court held:

"The important power to purchase or consolidate a railroad with another line cannot be inferred from such indefinite language as '*to unite or connect with such road.*' The doubts with regard to the authority granted in a corporate charter ought to be resolved

against the corporation. To make a purchase of one railroad by the owner of a parallel line valid, the former must have power to sell, as well as the latter power to buy."

In conclusion, it is respectfully submitted that the propositions of law discussed herein, for the purposes of this motion, have been settled beyond any question of doubt by this court in the cases to which I have referred to herein. The record will show that neither the Covington Electric Company, nor the Suburban Electric Company, was empowered to sell or assign said exclusive franchise; and in the absence of such power, it must necessarily result, if this is true, that the appellant herein did not take or come into possession of the said exclusive franchise by virtue of the consolidation, or by virtue of the attempted transfer of said exclusive franchise from the said Covington Electric Company to the said Suburban Electric Company. The present party in interest, the Union Light, Heat and Power Company, did not receive or come into possession, and is not possessed of said exclusive franchise, by virtue of the attempted sale of same, by said Suburban Electric Company to the North American Light Company, and the re-sale by said North American Light Company to the Union Light, Heat and Power Company.

It is respectfully submitted, that these questions of law have been finally and conclusively decided and established by many decisions of this court, and that the record herein will show that there is absolutely no merit in the contentions of appellant herein to said exclusive franchise, but that said appeal has only been taken to this court (after the appeal to the Circuit Court of Appeals was dismissed), for the purposes of delay only, and to prevent the appellee city herein,

from erecting its own municipal light plant to light its streets and public buildings.

It is respectfully submitted that the motion to affirm should be sustained.

F. J. HANLON,
Solicitor for the Appellees.

AUTHORITIES CITED.

Whitney v. Cook, 9 Otto 607. Hinckley v. Morton, 13 Otto 764. Micas v. Williams, 14 Otto 556. The S. C. Tryon, 15 Otto, 267. Swope v. Leffingwell, 15 Otto 3. Shields v. Ohio, 95 U. S. 319, (24: 357). Main Cent. R. R. Co. v. State of Maine, 96 U. S. 499—513, (24: 836). Atlantic & Gulf R. R. Co. v. State of Georgia, 98 U. S. 359, (25 : 185.) Keokuk & Western R. R. Co. v. State of Missouri, 152 U. S. 301, (38 : 450.) Yazoo & Mississippi Valley R. R. Co. v. Wirt Adams 180 U. S. 2, (45: 396.) Beman v. Rufford, 1 Sim. (U. S.) 550. Winch v. R. R. Co., 13 L. ffi. Eq. 506. Chesapeake & Ohio R. R. Co. v. Miller, 114 U. S. 176. Memphis & Little Rock R. R. Co. v. Berry et al. 112 U. S., 609, (28: 837). Gibbs. v. Consolidated Gas Co. of Baltimore City, 130 U. S. 396 (32: 979). Oregon Ry. & Navigation Co. v. Oregonian Ry. Co. 130 U. S. 1, (32: 837). Covington & Lexington T. P. Road Co. v. Sandford, 164 U. S. 578. Minn. & St. L. R. R. Co. et al. v. Gardner, 177 U. S. 330, (44: 793). L. & N. R. R. Co. v. Comonwealth of Kentucky, et al. 161 U. S. 677 (40: 849).

SUPREME COURT OF THE UNITED STATES.

No. 246.

Chas. H. Shaw, Trustee; the Union Light, Heat and Power Co., and The Suburban Electric Co., Appellants.

vs.

The City of Covington, *et al.*, Appellees.

Brief for Appellees.

Appeal from the Circuit Court of the United States, for the Eastern District of Kentucky.

STATEMENT OF CASE.

During the year 1900, the appellee, City of Covington, desired to build a municipal electric light plant to light the streets and public buildings of said city; the question, "Shall the City of Covington issue bonds to the amount of $75,000 for the erection and construction of a municipal electric light plant, to light the streets and public buildings?" was submitted to a vote of the people of said city, during said year, and said proposition carried by a large majority of the voters of said city. The General Council of said city was about to issue said bonds when it was enjoined by the appellant herein, as Trustee of the Suburban Electric Company, said company claiming to have an exclusive franchise to furnish electric light to said city for a period of twenty-five years, beginning April 22d, 1882, and expiring April 22d, 1907.

The Suburban Electric Company was a consolidated company, consisting of three constituent corporations, to-wit: The Suburban Electric Illuminating, Heating and Power Company, of Newport, Ky.; the Citizens' Electric Light Company, of Dayton, Ky., and the Covington Electric Light Company, of Covington, Ky.

By an act of the Legislature of Kentucky, approved April 22d, 1882, a charter was granted to the Covington Electric Light Company, and said company was given the exclusive privilege of conducting the business of electric lighting and furnishing the City of Covington and its inhabitants with electricity for a term of twenty-five years, as aforesaid. On April 11th, 1894, the three corporations aforesaid were consolidated under the name of the "Suburban Electric Company" by virtue of "An Act providing for the creation and regulation of private corporations," which became a law April 5th, 1893, and which will be found in Chapter 32, page 328, of the Kentucky Statutes. This new company was capitalized at two hundred and fifty thousand dollars ($250,000), the bonds of which were divided as follows: To A. Stuart, in trust for the stockholders of the Covington Electric Company, twelve hundred and fifty (1250) shares of stock and bonds of the consolidated corporation, to the amount at par of one hundred and sixteen thousand dollars ($116,000); to C. J. Helm, in trust for the stockholders of the Suburban Electric Illuminating, Heating and Power Company of Newport, nine hundred (900) shares of stock, and bonds at par of eighty-three thousand, five hundred dollars ($83,500); to H. Buchanan, Jr., for the stockholders of the Citizens' Electric Light Company of Dayton, three hundred and thirty-five (335) shares of stock and bonds of the consolidated corporation at par of thirty-two thousand, five hundred dollars ($32,500); to be retained in the treasury eighty-five thousand dollars ($85,000) of said bonds.

The articles of consolidation recite "that the properties, both tangible and intangible, of said several corporations are

very unequal, and the franchises of each very valuable, but not equally so, and in order to equalize the same, and to obtain the consent of the several stockholders in each of said corporations, it has been agreed by and between them that the consolidated corporation should be capitalized at two hundred and fifty thousand dollars ($250,000), and stock and bonds divided as above stated." Said articles of consolidation also recited "*that the old stock in said several corporations had been called in and cancelled, and all obligations, bonded or floating, of each of said several corporations had been fully liquidated and paid.*" Said articles of consolidation recited "that there was retained to the consolidated company each and all the properties, franchises, license, privileges, business, credits, assets and effects granted unto each constituent corporation by the several acts of incorporation."

The consolidated company was to be governed by nine directors. The Covington Electric Company's charter provided for five directors, which could, by vote, be increased to nine. The charter of the Suburban Electric Illuminating Heating and Power Company provided for seven directors, which could be increased to nine. The charter of the Citizens' Electric Company provided for seven directors, which could be increased to nine.

By the articles of said incorporated company, the exclusive franchise granted to the Covington Electric Light Company, as aforesaid, was attempted to be assigned and transferred to said consolidated company, and the said Suburban Electric Company is now asserting and claiming that said exclusive franchise passed to it by virtue of the consolidation of the three aforesaid constituent corporations.

The record herein will show that during the pendency of this case in the court below, said Suburban Electric Company (the consolidated company) attempted to assign and transfer said exclusive privilege above described to the North American Company, a corporation existing under the laws of the State of New Jersey; that thereafter said North American Light Company attempted to sell and assign said ex-

clusive franchise aforesaid to the Union Light, Heat and Power Company (now the real party in interest herein). (See page 15 of the record.)

The appellant claims that the attempt by the appellee, City of Covington, to erect and construct its own municipal light plant is an impairment of the exclusive franchise and contract made between the State of Kentucky and the Covington Electric Light Company, as aforesaid; the appellees filed a demurrer to the bill of complaint in the Court below, and not waiving its demurrer, also filed an answer. The questions involved are principally of law, and the Court below, after a full hearing and argument, sustained the demurrer to the petition, and dismissed the bill of complaint. The appellants excepted to said decree and prayed an appeal to the United States Circuit Court of Appeals for the Sixth Circuit; they filed their assignment of errors, executed bond, and said appeal was filed and docketed in the Circuit Court of Appeals for the Sixth Circuit, sitting and holding its sessions in Cincinnati, Ohio; citation was issued upon appellees and served upon them. (See pages 84, 85 and 86 of the Record.) Said appeal to the United States Court of Appeals for the Sixth Circuit was dismissed upon motion of the appellants, and on the 23d day of December, 1902, the appellants filed in the United States Circuit Court for the Eastern District of Kentucky a petition for appeal and an assignment of errors, and prayed an appeal to the Supreme Court of the United States, which was allowed, and the injunction continued in force pending said appeal. The case is now before this Honorable Court, brought here by appellants, who are complaining of the decree and judgment dismissing the bill of complaint, rendered by the Court below.

PROPOSITIONS DISCUSSED.

(1) The Covington Electric Light Company never had an irrepealable contract with the State of Kentucky, because by certain laws of the State of Kentucky the Legislature reserved the right to amend, alter or repeal said contract at any time, and the Legislature of Kentucky has the right to repeal or modify all charters granted by the State "unless a contrary intent is expressed in said charter."

(2) The Legislature has repealed the exclusive franchise granted to the said Covington Electric Light Company, and said franchise has been cut down, and ceased to exist on September 28th, 1897.

(3) The exclusive franchise granted to the Covington Electric Light Company was lost when said company consolidated with the Suburban Company.

(4) Said exclusive franchise, if any, was forfeited by failure of the said Covington Company to comply with certain provisions of its charter; by its failure to comply with certain ordinances and regulations of the City of Covington, which provisions were conditions precedent to its right to operate in the City of Covington.

(5) Doubt in mind of the Court resolved in favor of public, and against corporation.

(6) An exclusive franchise, such as is claimed by appellant, can not be sold or assigned by one company to another, without express legislative authority. No such authority has been granted by the State of Kentucky to the Covington Electric Light Company, or to any of the other companies herein.

ARGUMENT.

I.

The Covington Electric Light Company never had an irrepealable contract with the State of Kentucky, because by certain laws of the State of Kentucky the Legislature reserved the right to amend, alter or repeal said contract at any time, and the Legislature of Kentucky has the right to repeal or modify all charters granted by the State "unless a contrary intent is expressed in said charter."

In 1856 the Legislature of Kentucky passed an act in these words, as follows:

> "All charters and grants of or to corporations or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to repeal at the will of the General Assembly, unless a contrary intent be therein plainly expressed; provided, that while privileges and franchises so granted may be repealed, no repeal shall impair other rights previously vested."

Under this law, the Legislature of Kentucky could at any time repeal the charter of the said Covington Company. This proposition and conclusion of law is sustained by many decisions of the Court of Appeals of Kentucky, and by this Honorable Court.

> "The constitutional provision that no 'special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the General Assembly,' entered into the acts under which the consolidations were made, and rendered the corporations created and the franchises conferred, subject to repeal or alteration, just as if they had been expressly declared to be so by the act. The act of 1873 in the particular in question was a legitimate exercise of

the reserved power of alteration, and was therefore valid." (Parker vs. R. R. Co., 109 Mass. 506.)

"Another branch of the argument of the counsel for the plaintiff in error calls for some further remarks. It is urged that the franchise here in question was properly held by a vested right, and that its sanctity, as such, could not be thus invaded. The answer is *consensus facit jus.* It was according to the agreement of the parties. The company took the franchise, subject expressly to the power of alteration or repeal by the General Assembly. There is, therefore, no ground for just complaint against the State." (Shields vs. Ohio, 95 U. S. 319.)

"The mere grant for a designated time of an immunity from taxation does not take such immunity out of the rule, subjecting such grant to the general law retaining the power to amend or repeal, unless the granting act contain an express provision to that effect.

"Where there is no irrevocable contract protecting a bank from taxation, the taxing power of Kentucky does not violate the contract clause of the Federal Constitution." (Citizens' Savings Bank of Owensboro vs. City of Owensboro et al., 173 U. S. 634.)

The Court in its opinion quotes as follows:

"The claim is that the Hewitt Act and its acceptance by the banks constituted an irrevocable contract, although at the time that act was passed there was a general statute of Kentucky reserving the right to repeal, alter or amend 'all charters or grants of or to corporations, or amendments thereof, and all statutes,' passed subsequent thereto, and although this general statute was expressly made a part of the Hewitt Act by the sixth section thereof. The wording of the sixth section accomplishing this result is: 'This act shall be subject to the provisions of Section 8, Chapter 68, of the General Statutes,' *the provision thus referred to being the general law of 1856 reserving the power to repeal, alter or amend, as above.* When the proposition relied upon is plainly stated, and its import clearly apprehended, no reasoning is required

to demonstrate its unsoundness. In effect, it is that the contract was not subject to repeal, although the contract itself in express terms declares that it should be so subject at the will of the legislative authority. The elementary rule is, that if at the time a corporation is chartered and given either a commutation or exemption from taxation, there exists a general statute, reserving the legislative power to repeal, alter or amend, the exemption or commutation from taxation may be revoked without impairing the obligations of the contract, because the reserved power deprives the contract of its irrevocable character and submits it to legislative control. The foundation of this rule is, that a general statute, reserving the power to repeal, alter or amend, is by implication read into a subsequent charter and prevents it from becoming irrevocable. In a case like the one now considered, where not only was there a general statute reserving the power, but where such general law was made by unambiguous language one of the provisions of the contract, of course the legislative power to repeal or amend is more patently obvious to the extent that that which is plainly expressed is always more evident than that which is to be deduced by a legal implication. In Tomlinson vs. Jessup, 15 Wall. 454, in speaking of a contract exemption from taxation arising from a charter, and of the right to repeal the same springing from a general law, reserving the power to alter or amend, which existed at the time the charter was conferred, the Court, through Mr. Justice Field, said, 'Immunity from taxation constituting in these cases a part of the contract with the government is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the Legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State.'"

There was no provision in the charter of the Covington

company "that it was not to be subject to repeal at the pleasure of the Legislature"; no such claim is asserted by the appellant herein. This being true, and this provision not being part of said charter, any claim to an exclusive franchise on the part of either of the appellants can not now be asserted, because under the Act of 1856, as construed by this Court, and the Court of Appeals of Kentucky, the Legislature had the right to repeal, amend or modify the charter of the said Covington company at any time.

In the case of the City of Covington vs. Kentucky, 173 U. S. 231, it was held:

> "That the granting of a franchise to a corporation forever did not indicate that it was not to be subject to amendment or repeal."

To the same effect see the case of Deposit Bank of Owensboro vs. Davies County, 102 Ky., page 208, wherein the Court held—

> "The 'other rights' which have become vested while operating under the charter can not be impaired by an amendment or repeal. These 'other rights' do not embrace 'privileges and franchises.' The 'privileges and franchises' are the rights bestowed by the State, to be withdrawn or destroyed at the pleasure of the Legislature. Privileges and franchises are not vested rights, either in the letter or spirit of the Act of 1856. 'Other rights' referred to in that act are such as the beneficiaries under the charter may have in property, in fact every interest which they could acquire in operating under the charter or law, and also such rights or interests as other persons may have previously acquired by contracts, mortgages, judgment, or otherwise in property belonging to the other corporations."

And in the case of Citizens' Savings Bank vs. Owensboro, *supra*, which is the same case as that in which Judge Paynter delivered the opinion just quoted from in the Supreme Court on error from the Kentucky Court of Appeals,

Mr. Justice White, in speaking of the decision of that Court, said:

> " In considering what constituted vested rights, the Court clearly pointed out that rights of this character did not embrace mere privileges or franchises conferred by the granting act, and such rights obviously come within the power to repeal and amend, and were not within the category of those taken out of the reach of such power."

The construction thus put upon these limitations upon the reserved power to repeal, contained in the Kentucky statute of 1856, and subject to which the Covington Company acquired its franchise, is such that there is nothing in them to prevent the Legislature of Kentucky from repealing, in pursuance of that power, the exclusive feature of that franchise. It has been held in a number of cases that an exemption from taxation contained in the charter of a Kentucky corporation was subject to repeal in pursuance of that power.

Also the case of City of Louisville vs. Bank of Louisville, reported in 174 U. S. 439, wherein Justice White in deciding the case said:

> " It is impossible, in consonance with reason, to conceive of an unlimited irrepealable contract right, where there is no unlimited irrepealable contract of which the right can be derived."

Also see case of Gulf & Ship Island Railway Co. vs. Hewes, reported in 183 U. S. 67, wherein this Court held — I quote from syllabus:

> " The exemption from taxation for a term of twenty years which Mississippi Act, February 23, 1882, Section 18, assumes to give to the railroad company thereby incorporated, must, in the light of the State Constitution, providing for the taxation of the property of corporations, in proportion to its value, and of the prior decisions of the State Courts,

be deemed to be subject to the power of the Legislature to alter, amend or repeal it.

"The question whether or not a repealable exemption from taxation, given by State law, has been in fact repealed by a subsequent statute, is one which turns upon the construction of a State law, and is not reviewable on writ of error from the Supreme Court of the United States to a State Court, although it would be otherwise if the exemption were irrepealable and thus constituted a contract.

"Taxes upon the privileges of corporations, being taxes upon their property, are subject to the limitations of Mississippi Constitution 1869, Article 12, Sections 13 and 20, requiring the property of corporations to be taxed, like that of individuals, in proportion to its value."

To the same effect see the following cases:

Bienville Water Supply Co. vs. Mobile, 186 U. S., page 212.
Northern Central Railway Co. vs. State of Maryland, 187 U. S. 255.
Louisville Water Co. vs. Clark, 143 U. S. 1.

From the foregoing authorities I take it to be conclusive that no irrepealable contract was ever granted to the Covington Light Company in 1882, but that said contract was to remain subject to repeal, alteration or amendment at the will of the Legislature of Kentucky. The question now arises, Has the Legislature repealed, altered or amended the charter of the said company? — and this brings me to a discussion of the second proposition.

II.

The Legislature has repealed the exclusive franchise granted to the said Covington Electric Light Company, and said franchise has been cut down and ceased to exist upon September 28th, 1897.

By an act of the Legislature of Kentucky of April 5th, 1893 (Section 573, Kentucky Statutes), it is made and provided as follows, to-wit:

> "The provisions of all charters and articles of incorporation, whether created by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict and all powers, privileges or immunities of any such corporations, which could not be obtained under the provisions of this chapter, shall stand repealed on September 28th, 1897. After the 28th day of September, 1897, the provisions of this chapter shall apply to all corporations created or organized under the laws of this State, if said provisions would be applicable to them if organized under this chapter."

The constitutionality of this act has been upheld by the Court of Appeals of Kentucky in the case of Williams vs. Nall (21st Ky. Law Reporter, page 1527), wherein the Court held:

> "Their only right to exemption from the debts of the corporation was by virtue of the statute giving it the power to exempt its stockholders from liability. This statute the Legislature had the right to repeal not only by virtue of the provisions of the Constitution above quoted, but by reason of the statutory reservation of this legislative power by the act of 1856, passed long before the enactment of the statute under which the corporation was organized. The stockholders formed the corporation on conditions held out by the State. One of these conditions was that the act under which they were created might be amended or altered by the Legislature at pleasure, as it might deem necessary. The Legislature might, in the first place, have provided that the stockholders should be liable for the corporate debts; and where it provided that they should not be so liable, but reserved the right to alter or amend the law or to repeal any grant or franchise obtained under it, those

> who had acted under the statute with full notice of facts can not complain that any constitutional right of theirs is violated by the alteration of the law"

Concerning the genesis of the act to which said section belonged the Court held:

> "One of the special aims of the Constitution was to rid the State of special legislation, and to secure a more perfect uniformity in the laws of the State. To this end Section 245 directed the appointment of Commissioners to revise the statute laws of the Commonwealth. The Commissioners so appointed reported to the next General Assembly a bill which was passed by it, entitled 'An act providing for the creation and regulation of private corporations, now Chapter 32, Kentucky Statutes.'"

And concerning the purpose of that section the Court said:

> "The statute was intended to secure uniformity. Time was given until September 28th, 1897, for the old corporations to adjust their affairs before the law was applicable to them, but the whole purpose and spirit of the act would be defeated if they were exempted from the operation thereof."

There can be no question but that the exclusive franchise and privilege asserted by appellant herein is an immunity which can not be obtained under the corporation law of Kentucky at the present time, and which stood repealed on September 28th, 1897; this privilege asserted by the Covington Light Company and the appellant, is an exemption and freedom from competition, and is therefore an immunity and privilege within the meaning of said act aforesaid. By the provisions of said act aforesaid, "all provisions of all charters and articles of incorporation, whether created by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with

the provisions of this chapter, to the extent of such conflict are to stand repealed on September 28th, 1897." The exclusive franchise claimed by the Covington Light Company is certainly in conflict with this act, and could not at the present time be obtained under the general incorporation law of Kentucky, because no corporation is now allowed an exclusive franchise such as is claimed by complainant.

The Legislature of Kentucky has no power to confer such franchise upon any corporation, since the adoption of the new Constitution of 1891.

Section 164 of said Constitution provides:

> "No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway."

This section prohibits and limits the right of the Legislature to confer such franchises, and empowers the municipality to confer such rights, after advertising for bids for same and letting the same to the highest and best bidder. To this extent the special privilege and exclusive franchise conferred upon the Covington Light Company is inconsistent with the corporation act of 1893, and the new Constitution of Kentucky of 1891.

If the consolidation of these corporations had not occurred in 1894, the Covington Light Company could not claim under its charter of 1882 that it had an exclusive franchise, because of the fact that said charter had been repealed, or rather said exclusive franchise had been cut down and limited to September 28th, 1897, by the incorporation act of 1893 aforesaid. If this is true, it must follow that the con-

solidated company which was organized in 1894 obtained no exclusive franchise by virtue of the consolidation with the Covington Light Company.

III.

The exclusive franchise granted to the Covington Electric Light Company was lost when said company consolidated with the Suburban Company.

It has thus far been shown that the Covington Company never had an irrepealable contract with the State of Kentucky, because the Legislature reserved the right to repeal, alter or amend said charter and contract, and it has also been shown that the Legislature has repealed and cut down said exclusive franchise to September 28th, 1897. The proposition I now desire to discuss to the Court is "that conceding the Covington Light Company had an exclusive franchise in 1894, when it was consolidated with the Suburban Company, it could not pass said exclusive franchise to the consolidated company by virtue of the consolidation." This proposition of law seems to be well established and supported by numerous decisions of this Court. The consolidation of said companies was effected under the corporation law, passed April 5th, 1893, heretofore referred to.

Sections 556 and 573 of said act are as follows:

> "When the agreement is signed, acknowledged and recorded in the same manner as articles of incorporation are required to be, *the separate existence of the constituent corporations shall cease*, and the consolidated corporations shall become a single corporation in accordance with the said agreement and subject to all the provisions of this chapter, and other laws relating to it, and shall be vested with all the property, business, credits, assets and effects of the constituent corporations without deed or transfer, and shall be bound for all their contracts and liabilities."

"The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly, or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and alll powers, privileges or immunities of any such corporations which could not be obtained under the provisions of this chapter, shall stand repealed on September 28th, 1897."

It will thus be seen that this Act of the Legislature of Kentucky, providing for the consolidation of corporations, provides "that when two or more corporations consolidate their interests, the separate existence of the constituent corporations shall cease, and the consolidated corporation shall become a single corporation," etc.

My contention is, that when this consolidation was effected in 1894, the separate existence of the Covington Light Company ceased to exist, including the exclusive franchise in controversy. This doctrine is supported by the following authority:

"The effect of the consolidation upon the status of the consolidated corporation and the constituent corporations depends upon the statute under which the consolidation is effected and intention of the Legislature therein manifested. The effect may be the creation of the consolidated corporation as a new and distinct corporation, and this is generally held to be the effect of the consolidation of domestic corporations." Am. and Eng. Ency. of Law (2d Ed.), Vol. 6, pp. 810 and 811.

"Where, however, at the time of the consolidation the Constitution prohibits legislative exemptions from taxation, the consolidated corporation will not acquire an exemption contained in the charter of one of the constituent corporations, granted before the adoption of the constitutional provision, the consolidation being the creation of a new corporation, which would

therefore be subject to all constitutional provisions in force at the time." Am. and Eng. Ency. of Law (2d Ed.), Vol. 6, page 818.

"Where the effect of the consolidation is to create a new corporation, its charter is subject to alteration and repeal by the Legislature under a power reserved in a general law at the date of the consolidation." Am. and Eng. Ency. of Law (2d Ed.), Vol. 6, page 813.

The articles of incorporation of appellant show that there was to be a new and distinct corporation; the stock and bonds in the new company (the Suburban) were divided in proportion to the values of the old companies; the property of the old companies were of unequal value; the stock in each of the old companies was called in and cancelled; the indebtedness in each was fully paid up; all the business of each old company was wound up; each of the old organizations, including the Covington Light Company, was dead; neither of the old companies had a President or Board of Directors; the new company was organized under the name of the Suburban Electric Company, and it came into existence subject to all the laws of the State which prohibited all exclusive franchises being granted, and which provided further that all legislative acts and charters should be subject to repeal, alteration and amendment at the will of the Legislature; after the consolidation was effected, nothing was left of the old Covington Light Company, and the exclusive franchise did not pass to the new consolidated company.

This doctrine is fully supported by numerous decisions of this Court, of which I will refer to a few.

In Shields vs. Ohio, 95 U. S., 319, the Court said:

"There was in the Constitution of Ohio a provision very similar to the one in Kentucky in reference to the power of the Legislature to alter or repeal a special privilege, etc. The Legislature had provided for the consolidation. In each case, before it took

place, the original companies existed and were independent of each other. It could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporations subsisted. All — the old and the new — could not co-exist. It was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolution. That being done, *eo instanti* the new corporation came into existence. But the franchise alone, to be a corporation, would have been unavailing for the purposes in view.

"There is a material difference between such an artificial creation and a natural person. The latter can do anything not forbidden by law. The former can do only what is authorized in its charter. (R. R. Co. vs. Harris, 12 Wall. 65; 79 U. S. XX. 354.) It was therefore indispensable that other powers and franchises should be given. This was carefully provided for. The new organization took the powers and faculties designated in advance in the acts authorizing the consolidation; no more and no less. It did not acquire anything by mere transmission. It took everything by creation and grant. The language was brief, and it was made operative by reference. But this did not affect the legal result. A deed *inter partes* may be made as effectual by referring to a description elsewhere as by reciting it in full in the present instrument. The consequence is the same in both cases.

"If the argument of the learned counsel for the plaintiff in error be correct, the constitutional restrictions can be readily evaded. Laws may be passed at any time enacting that all the valuable franchises of designated corporations antedating the Constitution shall, upon their dissolution, voluntary or otherwise, pass to and vest in certain newly created institutions of the like kind. The claim of the inviolability of such franchises would rest on the same foundation as the affirmation in the present case. The language of the Constitution is broad and clear, and forbids the construction which would permit such a result.

"*When the consolidation was completed, the old cor-*

porations were destroyed; a new one was created, and its powers were 'granted,' to it, in all respects, in the view of the law, as if the old companies had never existed, and neither of them had ever enjoyed the franchises so conferred. The same legislative will created and endowed the new corporation. It did one as much as the other. In this respect there is no ground for any distinction.

"These views are sustained by several well considered cases exactly in point. One of them embodied the unanimous judgment of this court. (Clearwater vs. Meredith, 1 Wall. 25, 68 U. S. XVIII., 604; McMahan vs. Morrison, 16 Ind. 172; State of Ohio vs. Sherman, 22 Ohio St. 411; Shields vs. Ohio State, 26 Ohio St. 86.)"

See also case of Maine Central R. R. Co. vs. State of Maine, 96 U. S. 499, wherein this Court decided:

"*The Maine Central Railroad Company was, upon the consolidation of the original companies, a new corporation, as distinct from them as though it had been created before their existence.* The fact that the powers, privileges and immunities which they had possessed were conferred upon the new company, so far as they could be exercised or enjoyed by it, in no respect affected its character as a distinct body. A new corporation may be as readily created by the union of two or more corporations as by the union of individuals; and its powers and privileges may as well be designated by reference to the charters of other companies as by special enumeration.

"It follows that the limitation of the taxing power of the State to a portion of their net income prescribed in the charters of the old companies ceased upon their consolidation into the Maine Central. When this new provision of the general law of 1831, which declared that any act of incorporation subsequently passed should at all times thereafter '*be liable to be amended, altered or repealed, at the pleasure of the legislature, in the same manner as if an express provision to that effect were therein contained, unless there shall have been inserted in such act of incorporation an express limitation or provision to the contrary.*"

Also case of Keokuk & Western R. R. Co. vs. State of Missouri, 152 U. S. 301:

> "The Missouri Legislature had no power in 1869 to extend to a new corporation, created by the consolidation of two other corporations, an exemption from taxation contained in an act passed in 1857, before the Constitution was adopted; the constitutional provision that no property shall be exempt from taxation applies to all corporations thereafter formed, either by original charter or by the consolidation of prior corporations under the Act of 1869."

Also case of Yazoo & Mississippi Valley R. R. Co. vs. Wirt Adams, 180 U. S. 2:

> "It can not be doubted that under this agreement it was contemplated that the constituent companies should go out of existence and that their officers should resign their trusts in favor of the officers of the new company; that their Boards of Directors should be supplanted by another Board, the names of whose members were contained in the agreement; that the stock of the constituent companies should be surrendered and new stock should be recognized as the stock of the new company; that the road should be operated by men holding their commissions from the new company, and that the entire administration of the functions of the constituent companies should be surrendered to the new corporation. *In short, nothing was left of the constituent companies but the memory of their existence — the mere shadow of a name.* But the new company which took its place certainly sprung into life with a new corps of officers and a full equipment for the successful operation of the road.
>
> "In view of the terms of the consolidating agreement to which reference had already been made, and of the several acts of the general assembly of Mississippi, authorizing these consolidations, we are of opinion that a new corporation was contemplated, and that, taken together, these several documents should be read as if they had expressly provided with legislative sanction for the formation of a new association.

> Exemptions from taxation are not favored by law, and will not be sustained unless such clearly appears to have been the intent of the legislators. Public policy in all the States has almost necessarily exempted from the scope of the taxing power large amounts of property used for religious, educational and municipal purposes, but this list ought not to be extended except for very substantial reasons; and while, as we have held in many cases, Legislatures may, in the interest of the public, contract for the exemption of other property, such contract should receive a strict interpretation and every reasonable doubt be resolved in favor of the taxing power."

To the same effect see St. Louis Rwy. Co. vs. Berry, 113 U. S. 465; Atlantic and Gulf R. R. Co. vs. Georgia, 98 U. S. 359.

These authorities, I take it, are sufficient and conclusive of the proposition I have bee ndiscussing, to-wit: That an exclusive franchise such as was claimed by the Covington Light Company (which was an exemption from competition) does not pass to another company by virtue of a consolidation; and if this proposition is true, it necessarily follows that the consolidated company (the Suburban) never took the exclusive franchise of the Covington Company.

IV.

> Said exclusive franchise, if any, was forfeited by failure of the said Covington Company to comply with certain provisions of its charter; by its failure to comply with certain ordinances and regulations of the City of Covington, which provisions were conditions precedent to its right to operate in the City of Covington.

In presenting this proposition, I will discuss —

First, the failure of the Covington Company to comply with certain charter provisions.

Second, the failure of said company to comply with certain ordinance and regulations of the City of Covington, all being conditions precedent to the right of said company to operate at all in the City of Covington.

The bill of complaint (pages 2 and 3 in paragraph 4 of record) contains the following allegations:

> " That the said Covington Electric Light Company, in pursuance to the exclusive privilege granted to it by its said articles of incorporation, did, on the —— day of ————, 1884, enter in and upon the streets of the City of Covington and erect thereon its poles and wires, and constructed in said city, at great expense to it, a large and expensive electric light plant, for the purpose of generating electric light and power and heat, in pursuance of the powers conferred upon it by its said articles of incorporation, commenced and continued to supply the City of Covington and the citizens thereof with electric light and electric power, generated through the plant so constructed by it, and carried and furnished to the consumers thereof over and by means of the poles and wires constructed by it through the streets of Covington, as aforesaid."

The defendants, in their answer herein (page 25 of record), " deny that the said Covington Electric Light Company, in pursuance to the exclusive privilege granted to it by its said articles of incorporation, did, on the —— day of ————, 1884, or at any other time, enter in or upon the streets of the City of Covington, or erect thereon its poles or wires, or constructed in said city, at great expense to it, a large or expensive electric light plant, for the purpose of generating electric light or power or heat, in pursuance of the power conferred upon it by its said articles of incorporation, or commenced or continued to supply the City of Covington, or the citizens thereof, with electric light or electric power, generated through the plant so constructed by it, or carried or furnished to the consumers thereof, over or by means of the poles or wires constructed by it through

the streets of Covington, as aforesaid; deny that said Covington Electric Light Company was, at the time of its consolidation into the Suburban Electric Company, or at any other time as hereinbefore set out, in full possession of the business being conducted by it as aforesaid."

The defendants, by way of affirmative matter, allege that by the terms and provisions of the act of April 22d, 1882, creating the Covington Electric Light Company, as hereinbefore set out, it is provided:

> "That the body hereby incorporated shall have the exclusive privilege of conducting the business above described within and adjacent to said city for the term of twenty-five years, but a non-user of the privilege of this act of incorporation for five years shall work a forfeiture."

Defendants allege "that the Covington Electric Light Company did not use or take advantage of the privilege granted by said act aforesaid, creating such corporation, and that such corporation did not commence operations under the privileges granted by said act within five years from the time said corporation was created, on April 22d, 1882."

The Court will thus observe that the very life and perpetuity of this corporation for twenty-five years depended on the condition, that said corporation would take advantage of the privileges granted by beginning operations and furnishing electric light to the City of Covington within five years from the act of incorporation on April 22d, 1882, or, as the act itself provides, "a non-user of the privilege of this act of incorporation for five years shall work a forfeiture." The complainant realized the importance of this condition in drafting the bill, and made the direct allegation "that said Covington Electric Light Company, in pursuance of the exclusive privilege granted to it, did, on the —— day of ————, 1884, enter upon the streets of the City of Covington, and erect thereon its poles and wires, and constructed, at great expense to it, a large and expensive elec-

tric light plant," etc. The complainant introduced no proof to sustain this allegation, and could introduce no proof to sustain it, because of the fact that said company did not enter in and upon the streets of the City of Covington until long after the year 1884, and in fact not until the year 1891, as their own testimony shows; and did not erect, at great expense, a large electric light plant on the —— day of ————, 1884, and, as complainant's proof shows, not until the year 1891, nine years after the act of incorporation.

I hardly think it necessary to discuss to the Court that the provision of the act of 1882, creating the Covington Electric Light Company, to the effect "that a non-user of the privilege of this act of incorporation for five years shall work a forfeiture," was a condition precedent to be performed by said company, and that if said company failed to perform said conditions within five years from the act of incorporation, its charter was forfeited, and it had no exclusive privilege or franchise after April 22d, 1887, having failed to comply with the provisions and the terms of its contract with the State of Kentucky.

This proposition, I think, is too clear for argument, but I will submit to the Court a few authorities to sustain said proposition.

> "Compliance with Statutory Requirements.—A broad distinction exists between those statutory requirements made necessary by general incorporation laws as prerequisites to the existence of corporate powers, and those acts of individuals seeking incorporation, but not made prerequisites to the exercise of such powers. *Without a compliance with the requirements of the former class, there can be no corporation, either de jure or de facto,* and any material omission in respect thereto may be taken advantage of collaterally in any form in which the corporation can properly be called in question." 7 Am. & Eng. Ency. of Law (2d Ed.), page 653, and cases cited in notes

> "A de facto corporation can never be recognized in

violation of a positive law." Jones vs. Aspen Hardware Co., 21 Colo. 263.

"Where a general corporation law requires that a certain proportion of the capital stock shall be paid in before the incorporation shall take effect, this requirement is a condition precedent, and the mere payment by means of note or check is held to be insufficient. There must be an actual payment in money." Livesey vs. Omaha Hotel Co., 5 Neb. 50; Jersey City Gas Co. vs. Dwight, 29 N. J. Eq. 246; Leighty vs. Susquehanna, etc., Turnpike Co., 14 S. & R. (Pa.) 434; Boyd vs. Peach Bottom R. Co., 90 Pa. St. 169.

"Conditions Precedent.— If the charter prescribes conditions precedent to the right to exercise the powers conferred, it must be complied with." 7 Am. & Eng. Ency. of Law (2d Ed.), 702.

"Thus, if the charter of a bridge company requires that it shall post at each end of the bridge a board, showing the rates of toll, as a condition precedent to the right to demand toll, it must perform the condition before any right to demand toll can be acquired." Bonham vs. Taylor, 10 Ohio St. 108, and Middle Bridge vs. Brooks, 13 Me. 391, 29 Am. Dec. 510.

"A national bank is prohibited by the national bank act from transacting any business except such as is incidental and necessarily preliminary to its organization until it has been authorized by the comptroller of the currency to commence business, and certain conditions must be complied with before the comptroller issues his certificate. Until authorized by the comptroller, therefore, a national bank can not lease offices or do any other business not incidental and not necessarily preliminary to its organization." McCormack vs. Market National Bank, 165 U. S. 538, affirming 162 Ill. 100, which affirmed 61 Ill. App. 33.

"This was an action in trespass by the plaintiff in error vs. the defendant railway company; the defendant in its answer setting up a claim of title under a charter and an act of Congress appropriating said land

to aid in the construction of the railroad. *There was a provision in the act of Congress that no patent should issue or no title shall vest in said territory of Minnesota until a continuous length of twenty miles of said road shall be completed, and it also provided that if the road was not completed in ten years, no farther land shall be sold, and the land unsold shall revert to the United States.*

" It is not competent for this Court to reject or disregard a material part of an act of Congress, unless it be so clearly repugnant to the residue of the act that the whole can not stand together.

" Whenever privileges are granted to a corporation, such privileges are to be strictly construed against the corporation and in favor of the public, and nothing passes but what is granted in clear and explicit terms.

" The territory acquired nothing under the act of Congress but a mere naked trust or power to dispose of the lands in the manner therein specified, and to apply the same to the use and purpose therein described.

" Congress could at any time repeal the act creating the trust, if not executed, and withdraw the power.

" *Where a period was fixed by an act for the completion of the contemplated improvement, and if the work was not completed within that time, then the power of the territory to dispose of the lands was to cease; such part of the lands as had been appropriated at the expiration of that period in execution of the work was to be unaffected by that provision; but the residue would cease to be held by the territory for the use and purpose for which the lands had been granted.*

" Ten years were accordingly allowed for that purpose, and if the work was not completed in that time, then the power of the territory to dispose of the lands was to cease, without any further action on the part of Congress. Such part of the lands as had been appropriated at the expiration of that period in execution of the work were to be unaffected by that provision, but the residue would cease to be held by the territory for the use and purpose for which the lands had been granted, and would again fall within the

operation of the pre-emption laws. If a patent is absolutely void upon its face, or the issuing thereof was without authority, or prohibited by statute, or the State had no title, it may be impeached collaterally in a court of law, in an action of ejectment." Rice vs. Minnesota & Northwestern R. R. Co., 66 U. S. 358.

"It may be laid down as a general rule that, where a power is given by statute to a corporation, and a time fixed within which that power shall be exercised, it must be executed within that time, or the power is gone.

"The result is, the Board of Trustees, after the third Tuesday of May, 1853, had no power under the statute to order the assessment and levy of taxes for ordinary town purposes for the current year, and that the plaintiffs are not, therefore, liable for the taxes thus levied on their property. Judgment affirmed." Town of Williamsport vs. Kent & Co., 14 Ind. 306.

1. Charter of Covington Electric Light Company void by non-compliance with conditions prescribed in act of incorporation, and this question of forfeiture can be raised in a collateral proceeding.

"See Brooklyn, etc., Co. vs. City, 78 N. Y. 524 (1879); re Brooklyn, etc., R. R. Co., 72 N. Y. 245 (1878); re Brooklyn, etc., R. R. Co., 75 N. Y. 335 (1878); Commonwealth vs. Lykens etc., Co., 110 Pa. St. 391 (1885); Farnham vs. Benedict, 107 N. Y. 159 (1887); in re Kings County El. Ry., 105 N. Y. 97 (1887), reversing 41 Hun. 415; People vs. National Sav. Bank, 11 N. E. Rep. 170 (Ill., 1887); affirmed, 129 Ill. 618 (1889). A new State Constitution may forfeit all charters previously existing, but which have not been used by the incorporators. Chinclechananonche Lumber, etc., Co. vs. Commonwealth, 100 Pa. St. 438 (1882), holding also that a constitutional provision that charters under which no organization has been made and business has been commenced shall lapse forthwith, is constitutional and self-enforcing. Where by its charter a street railroad is to be commenced within three years and completed within

ten years, but it does not even open books for subscriptions until nearly twenty years have elapsed, the corporation never came into existence, and abutting property owners may enjoin the laying of tracks. Bonaparte vs. Baltimore, etc., R. R. Co., 75 Md. 340 (1892). In Texas the statute is self-executing, the words used being the same as in the New York statute. But the property rights survive for the benefit of creditors and stockholders. Sulphur Springs, etc., Ry. vs. St. Louis, etc., Ry., 2 Tex. Civ. App. 650 (1893). A provision that, unless certain roads should be completed within a certain time, 'its corporate existence and its powers shall cease, so far as it relates to that portion of said road then unfinished,' is self-executing. Houston vs. Houston, etc., Ry., 84 Tex. 581 (1892). A subscriber, sued on his subscription for stock, may defeat the suit by showing that by statute the charter was to be void if no work was commenced within two years, and that such two years have elapsed and no work has been done. Bywaters vs. Paris, etc., Ry., 73 Tex. 624 (1889). Under the Virginia law, requiring organization within two years or else the charter is void, the charter becomes void 'without legal proceedings of any kind from mere operation of law.' Welch vs. Old Dominion, etc., Co., 10 N. Y. Supp. 174 (1890); Stillman vs. Fredericksburg, etc., R. R., 27 Gratt. (Va.) 119 (1876). See also cases of Rice vs. Minnesota & N. W. Ry. Co., 66 U. S. 358, and McCormack vs. Market National Bank, 165 U. S. 538, on right to attack forfeiture of charter in collateral proceeding."

"The franchise of a gas company reverts to the Commonwealth, without any action on the part of the State, if it fails to carry on its work and construct its necessary buildings within two years from the date of its letter patent." West Manayunk Gas Light Co. vs. New Gas Co., 21 Pa. Co. Ct. 369.

"Where a news gathering corporation was granted the right to conduct a telegraph and telephone business, and the right of eminent domain, but never exercised that right for a long period of time, the right lapsed by non-user. State ex rel. Star Pub. Co. vs.

Asso. Press, 60 S. W. 91; 159 Mo. 410; 51 L. R. A. 151. The want of corporate existence may be pleaded in abatement or bar." Oregonian Ry. Co. vs. Oregon Ry. & Nav. Co., 23 Fed. 232.

"The right granted to a corporation by a municipal ordinance to construct and maintain an electric light plant, even assuming such right was exclusive, was not impaired by Fla. Laws, chap. 4600, at Fla. 2, May 27th, 1899, empowering the city to construct and maintain its own electric light plant, where nothing had been done by the grantee looking towards the erection and operation of such a plant, although it had erected and operated the gas plant which it was authorized by the same ordinance to construct and maintain.

"The condition upon which attached the exclusive privilege so far as the electric light plant was concerned has never been performed, for the company has never been put into successful operation, so far as that branch of its business is concerned, nor has it ever commenced to carry out in good faith the terms of its articles of incorporation in regard to erecting an electric light plant. The first company never acquired the right to the exclusive privilege mentioned in the statute, because it failed to perform the condition *precedent*, and therefore it had no exclusive privilege to transfer to the appellant company, so far as the electric light plant is concerned." Capital City Light and Fuel Co. vs. Tallahassee, 186 U. S. 399

There is no merit in the claim of the appellant; it admits apparently that it is in the wrong; that the old Covington Electric Light Company never complied with the terms of its contract entered into between it and the State of Kentucky; that the consideration and condition of said grant by the Legislature to said company have never been complied with by said company; but in defense it says that, notwithstanding the conditions precedent in said grant by the Legislature to said company have not been complied with and the charter of said company has become forfeited, and is void and of no effect, yet it contends that this can only be taken advan-

tage of in a direct proceeding by the State to forfeit said charter. The proposition is absurd. The plaintiff herein must make out its case, and the proof must sustain the allegation made by complainant in the original bill, "that the Covington Electric Light Company began operations to furnish electric light in the City of Covington on the —— day of ————, 1884." The proof absolutely fails to sustain said allegation, and I therefore submit that said Covington company having failed to use or take advantage of the privileges granted by the Legislature within five years from April 22d, 1882, therefore the charter granted to the said company after that time became void and of no effect, and was forfeited.

There can be no question but that the provision of the act of 1882, to the effect "that a non-user of the privilege of this act of incorporation for five years shall work a forfeiture," was a condition precedent and self-executing. The failure of said company to begin operations within said time can be taken advantage of in a case of this kind. This has been decided by this Court in the case of the Capital City Light, etc., Co. vs. Tallahassee, 186 U. S. 399, above, wherein this Court held, upon almost a similar state of facts, "that the first company never acquired the right and exclusive privilege mentioned in the statute, *because it failed to perform the conditions precedent* (my italics), and therefore it had no exclusive privilege to transfer to appellant company, so far as the electric light plant is concerned."

> "We have seen that the city had no authority to grant exclusive privileges to use its streets for the purpose of furnishing light from gas and electricity, but even if it did have such power, it could not confer such exclusive right and at the same time defer construction of the plant until such time as it could be made to pay 8 per cent. upon the investment. The effect of such a provision in an ordinance like the one we are considering is that the city will not permit any other person or corporation to use its streets for the public purpose of furnishing electric lights for twenty-

five years, but at the same time will not require the person or corporation to whom the exclusive privilege is granted to furnish such lights until such time as it can make an annual profit of 8 per cent. on its investment. The city has no such power over its streets, which are held by it in trust for the public benefit, (Florida C. & P. R. Co. vs. Ocala Street & Suburban R. Co., 39 Fla. 306, 22 So. 692; Gonzales vs. Sullivan, 16 Fla. 791, 820,) and even if it did, so long as the grantee failed to invest money in a plant, the ordinance could be repealed or modified, being without consideration."

2. The exclusive franchise was forfeited by the failure of said company to comply with certain ordinances and regulations of the City of Covington, all being conditions precedent to the right of said company to operate at all in the City of Covington.

The charter incorporating the Covington company of date April 22d, 1882, provides as follows:

> "Said company shall have the privilege, *subject to the regulations of the city authorities* (my italics), to lay its pipes and mains, to erect its poles, posts and wires through and along any street or highway in the city aforesaid, or adjacent thereto, as it may deem fit; provided, it in no way permanently obstructs the use of same to the public or any individual; and it is hereby required to place and put in repair any street or highway through which its line of pipes, wires, etc., may pass; but it is allowed to temporarily obstruct for a reasonable time in laying its lines and repairing the same."

The answer of the defendants (pages 19, 20, 21, record) alleges "that in compliance with this power and authority granted in said act, the City of Covington passed several ordinances regulating the manner and method by which all electric light companies might enter in and upon the streets of the City of Covington and erect its poles, posts, and string its wires through and along any street or highway in the

city; and also providing that said companies should first obtain permission from the City of Covington to exercise said privilege, and should execute bond in the sum of twenty thousand ($20,000) dollars to restore and replace the streets in good condition and to save the city harmless from any damage that may occur through any negligence of said company or companies entering in and upon the streets as aforesaid. The defendants in their answer allege that the Covington Electric Light Company never did obtain permission from the City of Covington to enter in and upon the streets of the city, to erect its poles or string its wires, and that said company is, and always has been, a trespasser in the City of Covington, and has no right to use the streets or other public places in the city." (For ordinance see pages 180-185, record.)

To avoid this plea of the defendants, the complainant, now the Union Light, Heat and Power Company, filed an amended bill, (pages 36, 37, record,) after the issues were made in this case and all the proof taken, alleging that "the said Covington Electric Light Company did begin operations under said act in the year 1891 by entering in and upon the streets of the City of Covington, erecting its poles and stringing its wires, and continued to do same up and till April, 1894, when the Suburban Electric Light Company was incorporated, and that no objection was offered by the city authorities to this use of the streets by said company between said period of 1891 and 1894, and that the city acquiesced in the use of said streets for said purpose by said company during this period."

These allegations are denied by the defendants not waiving their demurrer to said amended bill, and the proof introduced by defendants on said issue is to the effect that the Covington Electric Light Company, in June, 1897 (after the five years had expired in which it should have begun operations), made application to the City of Covington to enter in and upon the streets of the city and erect its poles and string its wires. Said application was refused, as stated by

Mr. W. H. Mackoy in his deposition, because said application was not signed by the President or any officer of said company, principally because no bond was offered by said company, as required by the existing ordinance of the city at the time. (See record, p. 177.) Mr. Mackoy was a Councilman of the City of Covington at the time, and chairman of the Committee on Law, and made a report to the City Council to the effect that said communication from the alleged Covington Electric Light Company be received and filed for the reasons above stated, and said action was so taken by the City Council. This certainly is not an act of acquiescence on the part of the city, but, on the contrary, shows that the city refused permission to the Covington Electric Light Company to enter in and upon the streets of the city, and tear them up and interfere with traffic, unless a bond was given to the city by said company to guarantee the replacing of the streets in proper condition.

The regulations as provided in said ordinances by the city, I submit, are very reasonable. The City of Covington is liable under its charter to maintain the streets and highways in proper condition, and is liable in damages to persons injured by reason of every accident that happens in and upon the sidewalks and streets of the city by reason of any defects that may exist therein.

> " There is a power abiding within the State to legislate so as to affect the corporate powers conferred by charter or statute, although such power may not be specially reserved either in the charter, the Constitution, or the general law. This is the power to pass laws for the promotion of the general peace, health and good order of the community, which laws are generally denominated police regulations. This is one of the inalienable powers of every sovereignty. It can not be effectually relinquished even by the express provisions of a charter, or other act of incorporation, so as to defeat the right of the Legislature, by which such charter is granted or statute passed, much less to operate as a restraint upon future assemblies. No

consideration, however valuable, could render such a stipulation binding. 'Contracts and rights, it is declared, are subject to this power, and not only may regulations which affect them be established by the State, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change or as experience may demonstrate the necessity.'" Thompson on Corporations, Sec. 5470.

"The Police Power Extends to the Reasonable Regulation of Corporations.— Speaking with reference to this power, it is said that every grant of corporate existence necessarily implies 'the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs as the Legislature may from time to time prescribe, which do not materially interfere with or obstruct substantial enjoyment of the privileges the State has granted, and served only to secure the ends for which the corporation was granted.'" Thompson on Corporations, Sec. 5473.

"Extent of Power Over Streets.— As the highways of a State, including streets in cities, are under the paramount and primary control of the Legislature, and as all municipal powers are derived from the Legislature, it follows that the authority of municipalities over streets, and the uses to which they may be put, depends entirely upon their charters or the legislative enactments applicable to them. It is usual in this country for the Legislature to confer upon municipal corporations very extensive powers in respect to streets and public ways within their limits, and the uses to which they may be appropriated. This will be illustrated everywhere throughout the present chapter. The authority to open, care for, regulate and improve streets, taken in connection with the other powers usually granted, gives to municipal corporations all needed authority to keep the streets free from obstructions and to prevent improper use, and to pass ordinances to this end. Thus a city, having 'the care, supervision and control of

streets, squares and common ' within its limits, may, by ordinance, prohibit the appropriation of these to private use, such as sales by individuals at auction thereon, or upon the sidewalks or streets." Dillon on Municipal Corporations, Vol. 2, Sec. 680. (See also Secs. 681, 682, 713.)

"Municipality May Affix Conditions to Its Consent.—Where, under the general statutes of a State, a railroad company was forbidden to construct and operate its road upon the streets of an incorporated city 'without the assent of the corporate authorities,' these are not limited to a simple granting or denial of the right of way, *but may prescribe conditions on which they will give their assent*, and if these are accepted by the railroad company, they are binding upon the parties; and accordingly, where the right of way along a street was granted by a city, on condition that the company should build a depot in a certain part of a city, and grade, rip-rap and pave the street it used, and the company agreed to accept it on these terms, it was held that it could not hold and enjoy the grant, and not comply with the conditions on which it was made." Dillon on Municipal Corporations, Vol. 2, Sec. 706.

"Act of Congress, July 24th, 1866, (Rev. Stat., §§ 5263-5268.) provides that any telegraph company organized under the laws of any State may construct and maintain telegraph lines over any portion of the public domain, and over and along any military or post road of the United States, provided that such lines shall be so constructed and maintained as not to interfere with travel. Act of Congress, June 8, 1872, (Rev. Stat., § 3964.) declares that all letter-carrier routes established in any city or town shall be post roads; Held, that any interstate telegraph company which had accepted the provisions of the act of 1866 was not entitled to erect and maintain its lines over the streets of a city without complying with the reasonable regulations of the city for the erection and maintenance of such lines, and without procuring a permit therefor from the city.

"The broad claim is made by the complainant that

by accepting the terms of the act of Congress of 1866 it became an agency of the federal government, and as such has the right to occupy with its wires and poles the post road of the United States, which include the streets and alleys of the city of Toledo, subject only to the limitation of not interfering with ordinary travel; that as it was not necessary originally to obtain the consent of the municipality to occupy the streets, it is under no obligation to obtain permits to put in new construction and do the work under the direction of the city civil engineer and superintendent of the fire-alarm telegraph. We think, however, in the use of these streets and alleys, although it had accepted the terms of the statute of 1866, the complainant was subject to the control of the municipality, and could not, in defiance of its reasonable regulations, erect poles and stretch wires without let or hindrance. It is necessary for its fire protection, and a proper knowledge of the obstruction in its streets, and the use to which its public places are being subjected, for the city to know, before any construction is put in, what is contemplated, and to have the work done under the supervision of its officers; and the complainant is no more exempt from such restrictions than any other corporation rightfully occupying the streets and alleys of the city.

"It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the State may, if it chooses, exact from the party or corporation, given such exclusive use, pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated. (City of St. Louis vs. W. U. Tel. Co., 148 U. S. 100-102; 13 Sup. Ct. 488, 489; 37 L. Ed. 384.)

"We think the complainant should have made the usual applications for permits to string its wires, stating exactly what was required, in accordance with the regulations of the city, with which it had been accustomed to comply, and it had no right to construct its work in defiance of these requirements." City of Toledo et al. vs. Western Union Telegraph Co., Circuit Court of Appeals, Sixth Circuit, March

5th, 1901; 107 Fed. Rep. 10; Vol. 7, Advance Sheets, Municipal Corporation Cases, page 1.

"A city ordinance granting exceptional privileges which interfere with the city's authority to control its streets must be construed strictly; and if there are words in it capable of various meanings, that interpretation should be adopted which will best conserve public interests.

"A company asking the intervention of a court of equity to enable it to enjoy franchises granted by a city ordinance must show that it has performed the obligations imposed thereby." Mayor, etc. of Baltimore et al. vs. Chesapeake & P. Tel. Co. et al., Court of Appeals of Maryland, Jan. 20, 1901; 48 Alt. Rep. 465; Advance Sheets, Vol. 7, Municipal Corporation Cases, page 7.

If this is true, as it undoubtedly is, I submit that the regulations provided for in said ordinances are reasonable, and that the Covington Electric Light Company having never complied with said regulations, it had no authority or right to enter in and upon the streets or sidewalks of the city, and was, and has been, a trespasser in said city without right or authority. If, as stated by the complainant the Union Light, Heat and Power Company, "the Covington Electric Light Company operated in the City of Covington between the years 1891 and 1894," it operated not by reason of any exclusive right or franchise that it had (because that had been forfeited), but it operated subject to the will and at the sufferance of the City of Covington, and said city could have at any time ordered said company to remove its poles and wires from said streets because it was a trespasser in the city; had not complied with its contract made with the State by beginning operations in time; had not complied with the ordinances and regulations of the City of Covington as prescribed; had not executed the bond required by said city, and had forfeited any exclusive franchise that it may have had with the State of Kentucky.

V.

Doubt in the mind of the Court resolved in favor of public, and against corporation.

"Where a right or privilege is claimed under the charter of the corporation, nothing is to be taken as conceded to it but what is given in unmistakable terms or by an implication equally clear." Northwestern Fertilizing Co. vs. Hyde Park, 97 U. S. 659.

"Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public. If the meaning of the words be doubtful, they shall be taken most strongly against the grantee, and for the government, and not extended by implication beyond the natural and obvious meaning of the words; and if these do not support the claim, it must fail." Minturn vs. Larue, 23 Howard, 435.

"In grant by the public nothing passes by implication. Doubts as to their interpretation are to be resolved in favor of the State." Stein vs. Bienville Water Supply Co., 141 U. S. 67.

"The granting of a corporate right or privilege rests entirely in the discretion of the State, and, when granted, may be accompanied with such conditions as its Legislature may judge most beneficial to its interest and policy." Home Ins. Co. vs. New York, 134 U. S. 594.

"A grant of power to a corporation is to be strictly construed against it." Persall vs. Great Northern R. Co., 161 U. S. 646.

"The doubts with regard to the authority granted in a corporate charter are to be resolved against the corporation." Louisville & N. R. Co. vs. Kentucky, 161 U. S. 677.

VI.

An exclusive franchise such as is claimed by appellant can not be sold or assigned by one company to another without express legislative authority. No

such authority has been granted by the State of Kentucky to the Covington Electric Light Company, or to any of the other companies herein.

The demurrer to the bill and amended bill of the Union Light, Heat and Power Company should be sustained and the bill dismissed because a franchise such as is claimed by said company herein is not subject to alienation or sale by one corporation to another, *unless expressly authorized by the act creating such a corporation.* If the Covington Company, or the Suburban Company, or the Union Light, Heat and Power Company, is such a corporation as entitles either to the exclusive privilege and franchise claimed, then such a franchise is one in which the public has some interest, and it can not be conveyed or alienated without the consent of the public or the authority creating it. This principle of law has been established beyond any question of doubt by decisions of most of the State Courts, and by this Court.

I refer the Court to the following authorities in support of this proposition:

> "The franchises of a turnpike corporation can not be sold at forced sale to pay a debt. And, although the doctrine of that case was questioned in the Bardstown case, it has been followed in a number of decisions since. It was followed in two cases in 1 Ky. Law Reporter, where it was held that a turnpike franchise can not be made the subject of a sale even to pay its debts, in the absence of special legislation allowing it. Such is the well settled law of this State." Winchester & Lexington Turnpike R. Co. vs. Vimont, 5 B. M. I. See also Turnpike Co. vs. Benj. Smith, trustee, 1 Ky. L. R. 68; Old State Road & Ripple Turnpike vs. Smith, 1 Ky. L. R. 125.

The same was held with reference to the franchise of a water company. Judge Pryor said:

> "This corporation, like a turnpike or railroad, can not be seized and sold by a collecting officer, or the

property necessary for its use, so as to deprive the public of the benefits to be derived from it, unless by legislative authority." Louisville Water Co. vs. Hamilton, 81 Ky. 517.

"This franchise — that is, the franchise of the Maysville & Big Sandy Railroad Co.— it could not transfer to another without distinct legislative authority. A grant of power to lease its property is one thing, and a grant of absolution from its responsibilities is another, and is not to be inferred from the mere power to lease a railroad where the corporation still retains its custody and the enjoyment of its franchise and rents, for such grants are strictly construed and as against the public are never extended by construction. In the case before us, there is only a grant to the lessor to operate and to contract for the operation of the road. The company enjoys all its franchise under the contract. There is nothing in the provision to show that the Legislature had in mind authorizing the company to divest itself of its franchises, or permitting it, while enjoying them or their fruits, to be acquit of responsibility for their abuse without regard to the financial ability of the lessee or his ability to sue." McCabe's Admr. vs. Maysville & Big Sandy R. R. Co., decided March 5th, 1902, and reported in 6th S. W. 1055.

"Alienation by Quasi Public Corporations in General.—By the weight of authority on the ground of public policy, the rule allowing alienation of its property by a corporation does not apply to the full extent to a corporation which is invested with the power of eminent domain, and whose business is of a public character. *Such corporations in the absence of express authority* can not alienate their property, either by sale, lease or mortgage, if by doing so they will be disabled even partially from performing the duties which they owe to the public." 7 Am. and Eng. Ency. of Law, (2d Ed.), 747, and cases cited in foot-notes.

"It is held in England that a corporation can not transfer its franchises or special powers and privileges to another without express legislative authority, and

so it has been held in Canada." Same authority, page 749.

" United States.—The rule is certainly the same in the United States so far as a franchise to be a corporation is concerned. And by the weight of authority the rule is the same as to other special privileges and powers. A corporation has no power in the absence of express legislative authority to transfer its franchises or special privileges, either absolutely or by lease for a term of years, or by mortgage or otherwise. This rule has been applied to various kind of corporations." See authorities cited in foot-notes, this doctrine being applied and confirmed by the Courts of Idaho, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Nebraska, New Jersey, New York, Ohio, Pennsylvania, and by the Courts of last resort in many other States.

" Reason for the Rule.—' The rule,' said Chancellor Zabriskie, in speaking of a lease of a canal and railroad, ' is founded on reason and principle. The franchises granted by the State are often parts of the sovereign power delegated to a subject and always privileges to which other citizens are not entitled. In these grants the State is supposed to regard the character of the grantee, or the guards and restrictions placed upon the corporation, when the grant is by a charter to persons continually changing by transfer of stock. In this case the franchise of maintaining a canal and railroad across public highways and navigable rivers, and of taking tolls and rates of fare fixed by themselves without control, or with others, a material part of the property leased; these can not be leased or alienated without consent of the State.' " Black vs. Delaware, etc., Canal Co., 22 N. J. Eq. 400.

" Mortgage of Franchise.— Incapacity of a corporation to transfer its franchise without legislative authority is not limited to absolute conveyance and leases, but extends to mortgages as well." South Yorkshire R. etc., Co. vs. Great Northern R. Co., 3 De G. M. & G. 576; Com. vs. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672; Richardson vs. Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700. See Coe vs.

Columbus, etc., R. Co. 10 Ohio St. 272, 75 Am. Dec. 518.

"As was said by Hoar J., in Com. vs. Smith, 10 Allen (Mass.) 455, 87 Am. Dec. 672: 'The power to mortgage can only be co-extensive with the power to alienate absolute conveyance by foreclosure.'"

"Telegraph Companies.—A railroad company authorized to construct a railroad and telegraph line is without the power to lease its right to construct, maintain and operate a line of telegraph, although it be stipulated in the contract that the lessee shall perform all the duties imposed upon the railroad company by its charter." Atlantic, etc., Tel. Co. vs. Union Pac. R. R. Co., 1 McCrary (U. S.) 541; American Union Tel. Co. vs. Union Pac. R. Co., 1 McCrary (U. S.) 188; Western Union Tel. Co. vs. Union Pac. R. Co., 1 McCrary (U. S.) 418, 558, 581; Central Branch Union Pac. R. Co. vs. Western Union Tel. Co., 1 McCrary (U. S.) 551; compare Montreal Tel. Co. vs. Low, 27 L. C. Jur. 257.

See also U. S.—Earle vs. Seattle, etc., R. Co., 56 Fed. Rep. 909; Thomas vs. Millville, etc., R. Co., 101 U. S. 71; Penn. R. Co. vs. St. Louis, etc., R. Co., 118 U. S. 290, 630, 24 Am. & Eng. Ca. 58.

"A corporation can not, without the assent of the Legislature, transfer its franchise to another corporation and abnegate the performing of the duties to the public, imposed upon it by its charter as the consideration in the grant of its franchise." Central Trans. Co. vs. Pullman Palace Car Co. 139 U. S. 24.

"Neither the grant of a franchise to transport passengers nor a general authority to sell and dispose of property, empowers the grantee, while it continues to exist as a corporation, to sell or to lease its entire property and franchise to another corporation." Idem.

"The restricted power of a railroad company to pledge its property and franchises for debts incurred by its construction does not authorize it to make in the first instance an absolute sale of its property, rights, privileges and franchises to a corporation of

another State." Chicago B. & K. C. R. Co. vs. Missouri, Guffey, 122 U. S. 561.

"A corporation in debt can not transfer its entire property by lease, so as to prevent the obligation of the property to the satisfaction of its debts." Chicago, M. & St. P. R. Co. vs. Chicago Third National Bank, 134 U. S. 276.

"A lease made by one railroad company to another, neither of which is expressly authorized by law to enter into the lease, is ultra vires and void." Pittsburg, C. & St. L. R. Co. vs. Keokuk & H. Bridge Co. 131 U. S. 371.

"A lease by a railroad company, of all its road, rolling stock and franchises, *for which there is no authority given in its charter,* is ultra vires and void.

"The ordinary clause in the charter transportation companies for the mutual transfer of goods and passengers over each others' roads is no authority to lease its road and franchises.

"The franchises and powers granted to such corporations, are in a large measure designed to be exercised for the public good, and this exercise of them is the consideration of the public grant. *Any contract by which the corporation disables itself to perform those duties to the public, or attempts to absolve it from their obligation, without the consent of the State, is a violation of its contract with the State, and is forbidden by public policy, and is, therefore, void.*" Thomas et al. vs. West Jersey R. R. Co., 101 U. S. 71.

"It is clear that a corporation has no authority or power to charter a new corporation or to confer any franchises whatever upon another company, or set of persons, unless the power is conferred in express terms, or by necessary implication. An attempt on the part of the agents of a corporation to transfer franchises conferred by the State upon the company would be wholly ineffectual and void unless the State intended to confer a power of making the transfer." Morawetz on Private Corporations, 2d Vol. (2d Ed.) Sec. 930.

"A law providing that the purchasers under a foreclosure sale of a railroad should forthwith be a corporation *and should succeed to all such franchises, rights and privileges* as would have been had by the first company but in such sale and conveyance did not confer an exemption to the new corporation formed by the purchaser under the foreclosure sale. The new corporation does not take any exemption or immunity from taxation, which belonged to the old company, although this was one of the franchises of the first company." Chesapeake & Ohio R. R. Co. vs. Miller, 114 U. S. 176.

"According to principle the exemption from taxation must be construed to have been a *personal privilege of the very corporation specifically referred to, and to have perished with that*, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor. This salutary rule of interpretation is founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the grants construed *strictissimi juris*.

"'The franchise to be a corporation,' said Hoar J., in Commonwealth vs. Smith, to Allen, 448, 455, '*clearly can not be transferred by any corporate body of its own will. Such a franchise is not in its own nature transmissible*.' In Hall vs. Sullivan R. R. Co., 21 Law. Rep. 138, 2 Redf. Rail. Cas. 621; 1 Brunner Collected Cases 613, Mr. Justice Curtis said: 'The franchise to be a corporation is, therefore not a subject of sale and transfer, unless the law by some provision has made it so, and pointed out the modes in which such sale and transfer may be effected.' No such positive provision is contained in the act under consideration, and no mode for effecting the organization of a series of corporations under it is pointed out, either in the act itself or in any other statute prior to that of December 9th, 1874." Memphis & Little Rock R. R. Co., vs. Berry, et al., 112 U. S. 609.

The same doctrine was reiterated and confirmed in the case of Wm. W. Gibbs vs. The Consolidated Gas Company of

Baltimore City, cited in 130 U. S. 396, wherein the Court held:

> "A corporation can not disable itself by contract from performing the public duties which it has undertaken, nor, by agreement, compel itself to make public accommodations subservient to its private interest."

In the case of Oregon Railway and Navigation Company vs. The Oregonian Railway Company, cited in 130 U. S., page 1, the Court, after an elaborate opinion, in which it reviewed the former opinions and decisions of the Court upon said proposition, sustained the doctrine "that a corporation has no right to sell or transfer its franchise unless specially authorized by law so to do."

By the Court:

> "One of the most important powers with which a corporation can be invested is the right to sell out its whole property, together with the franchises under which it is operated, or the authority to lease its property for a long term of years. In the case of a railroad company, these privileges, next to the right to build and operate its railroad, would be the most important which could be given it, and this idea would impress itself upon the Legislature. Naturally, we would look for the authority to do these things in some express provision of law. We would suppose that if the Legislature saw fit to confer such rights, it would do so in terms which could not be misunderstood. To infer, on the contrary, that it either intended to confer them, or to recognize that they already existed, by the simple use of the word *'assigns,'* a very loose and indefinite term, is a stretch of the power of the Court in making implications which we do not feel to be justified.
>
> "The legislators who enacted these statutes may have had an idea that there were certain things which corporations could assign; they may have used the expressions to which we have referred in a very loose

instead of a technical sense; or they may have supposed that cases might arise where railroad property going by some operation of law, as bankruptcy or foreclosure, from the hands of its original owners into the possession of other persons, would justify the description of the latter by the words '*successors and assigns*.' In using these terms they may have thought that authority might be given by future statutes, either generally to all corporations or to some special organization, to sell or transfer the corporate property or some part of it. But, whatever may have been their purpose, we think the argument is a forced one which would vest in railroad companies the general power to sell or lease their property or franchises, or to make contracts to buy or take leases of the same, from other railroad corporations, from the use which is made of these indefinite terms 'successors or assigns.'"

In Central Transportation Co. vs. The Pullman Palace Car Company, 139 U. S. 24, the Court upheld this principle of law, and referred to many similar cases. I quote from opinion:

"The provisions of the statute by which the plaintiff is empowered to contract with other corporations, '*for the leasing or hiring and transfer to them, or any of them,*' of its 'railway cars and other personal property,' is fully satisfied by construing it as confirming the plaintiff's right to do as it had been doing, to lease or hire (which are equivalent words) to other corporations for the regular course of its business, and to 'transfer' under such leasing or hiring, its railway cars and other personal property either connected with the cars, or at least to the same general nature of tangible property. *It can hardly be stretched to warrant the plaintiff is making to a single corporation an absolute transfer or a long lease, of all that might be comprehended in the words 'personal property' in their widest sense, including not only goods and chattels, but moneys, credits and rights of action.* In any view it would be inconsistent alike with the main purpose of the statute, and with the uniform course of decision of this court, to

construe these words as authorizing the plaintiff to deprive itself, either absolutely, or for a long period of time, of the right to exercise the franchise granted to it by the legislature for the accommodation of the public."

"The important power to purchase or consolidate a railroad with another line can not be inferred from such indefinite language as '*to unite or connect with such road.*' The doubts with regard to the authority granted in a corporate charter ought to be resolved against the corporation. To make a purchase of one railroad by the owner of a parallel line valid, the former must have power to sell, as well as the latter power to buy." Louisville & Nashville R. R. Co. vs. Commonwealth of Kentucky, et al., 161 U. S. 677.

"A grant to each of two new corporations of '*the powers, rights and capacity*,' which had been granted to a corporation which they succeeded, and the property of which is divided between them, does not confer on the new companies the exemption conferred upon the original company from legislation, changing the rates of toll, which would prevent the company from earning as much as 14 per cent. on its capital stock." Covington & Lexington T. P. Road Co. et al., vs. A. P. Sandford et al., 164 U. S., 578.

"A new corporation was formed by the consolidation of railroad companies under the Minn. Spec. Laws, 1881, Chap. 113, providing for the manner of consolidation, the name of the new company, which might be '*the name of either corporation party thereto or any other name*,' the transfer of the property of the old corporations, the retirement of their stock and the issue of new stock, and for compensating the stockholders of the old corporations who decline to convert their stock into the stock of the new company.

"The grant to a consolidated railroad company by Minn Spec. Lews, 1881, Chap. 113, of the franchises, exemptions and immunities of the older company, does not include the exemption which the stockholders of the earlier company were given, by mere implication, without any express provision there-

for, even if such exemption could be granted by the Legislature under the provisions of the State Constitution of 1858, which imposes liability upon the shareholders of all such corporations." Minn. & St. L. R. R.R Co., et al., vs. Gardner, 177 U. S., 330.

AS TO DEPARTURE.

The pleading of the supplemental bill of complaint filed by the Union Light, Heat and Power Company, May 16th, 1901 (pp. 36 and 37 of Record), setting up acquiescence on the part of the city, is a departure from the allegations made in the original bill, and the demurrer to this supplemental bill should be sustained upon the following authorities:

"A departure in pleading is said to be when a party quits or departs from the case or defense which he has first made and has recourse to another." Chitty on Pleading, Vol. I., page 644.

"Performance, and excuse for non-performance, are two distinct matters, and a party must aver with certainty upon which one he depends. When a declaration or complaint avers performance, and to a plea of non-performance, there is a replication or reply of excuse for non-performance, there is a departure. So, also, if the plaintiff avers delivery, but in his replication alleges a tender and refusal.

"Where a plaintiff, in his replication or reply, changes his ground in point of law, it is as much a departure as though he had changed it in point of fact.

"Where performance is pleaded, and matter of excuse is afterwards set forth in the rejoinder, it is a departure. So, also, if defendants plead performance, a rejoinder of tender of performance is bad as being a departure from the plea." 6 Ency. of Pleading and Practice, pp. 462, 463, 464, and cases cited in notes.

"Where a defendant's liability depends upon a condition precedent, plaintiff must allege and show the

happening of that condition or a sufficient excuse. When the plaintiff avers that a contingency has happened and the defendant traverses, it is a departure for plaintiff to reply an excuse." Alfred Murray vs. Jesse Bright et al., 2 A. K. Mar. 146.

"The declaration avers a delivery, etc. Plea that the plaintiff did not deliver, etc. Replication that the plaintiff tendered and the defendant refused; the replication is a departure from the declaration. A departure in pleading may be taken advantage of on general demurrer." Pollard vs. Taylor, 2 Bibb. (Ky.) 234.

In conclusion, I submit that the consolidation of these three companies into one, on April 11th, 1894, created a new corporation of that date; and if this is true, it could take no exclusive franchise or privileges as the same were prohibited by the Constitution and laws existing at said time. The laws giving such exclusive privileges had been repealed; the State had the right to repeal them, and the act of 1856 was a part of the charter of the Covington Electric Light Company; said company took its charter knowing that the Legislature could at any time take away this special privilege. Not only the Constitution, but the Act of 1856 gave the right to repeal, amend or modify this charter, and the charter contained no words to the contrary. Such exclusive privilege stood repealed on September 28th, 1897, because it was inconsistent with the provisions of the Constitution of 1891, and the corporation law of Kentucky, being the Act of April 5, 1893, and being Sections 556 and 573 of the Kentucky Statutes.

I take it to be settled beyond any question of doubt, that if the said Covington Electric Light Company ever did have an exclusive franchise, it was lost by virtue of consolidating with the Suburban in 1894, and I submit that the decisions of the Supreme Court of the United States are clear in support of this contention: "That an exclusive franchise held by one corporation does not pass to a consolidated company,

but is lost by virtue of the consolidation." The proof in this case shows conclusively that the complainant has absolutely failed to make out its case or support the allegations made in its bill that the Covington Electric Light Company did take advantage of, or commence operations within five years from the time it was incorporated in 1882, and as it was required to do under the provisions of the said charter. Failing in this, it lost any exclusive privilege that it may have had or obtained from the Legislature; violated its contract with the State, and forfeited its charter.

This is an action in equity by the complainant, asking an extraordinary and unusual remedy — an injunction to restrain the City of Covington from erecting its own light plant. The burden of proof is on the complainant, to show by a preponderance of evidence that it has complied in every particular with the terms of its contract with the State and city; otherwise, there is no contract which the defendant city could violate. One of the conditions of that grant by the Legislature was that said company must begin and take advantage of, and use the privileges granted within five years from the act of incorporation in 1882; that was alleged in the bill and denied by the defendants; the proof fails to support the allegation, and the complainant has failed to show compliance with the terms of the grant of 1882. Failing in this, everything done, transaction or contract made and entered into by said company after the lapse of said five years, was void and ultra vires.

I think it is clear to the Court that the complainant, when it filed its replication to the answer herein, expected to be able to prove the allegations in its said bill. Failing in this proof, it then attempted to shift its cause of action, and alleged in the amended bill of The Union Light, Heat and Power Company "acquiescence" on the part of the city, which plea is clearly a departure according to the established rules of pleading.

I am not contending that the charter of the Suburban

Electric Light Company, or its successor, the Union Light, Heat and Power Company, is of no effect or void, or that either of these corporations has no corporate existence. I admit that a new corporation was formed in 1894, when the Suburban Electric Company was created, but deny that it took or had any exclusive franchise by virtue of said incorporation. It is a corporation, together with the Union Light, Heat and Power Company, organized and given the right to furnish electric light in the City of Covington, but neither has an exclusive right.

The act creating the Covington Electric Light Company empowered the City of Covington to regulate the manner and method by which said company might enter in and upon the streets and highways of said city to erect its poles and string its wires. Upon this authority, the City of Covington passed several ordinances regulating the manner and method by which said company, or similar companies, might use the streets and highways of the city, and required said company, or companies, to first make written application to the city for said purpose, and to accompany said written application by a bond of twenty thousand dollars ($20,000), to secure the city against loss by reason of any negligent acts of said company in using the streets of the city, and as a guarantee that said company would replace the streets and keep them in proper condition wherever they so used them. The Covington Electric Light Company never obtained permission from the City of Covington to use the streets of the city; it never executed the required bond as provided for, and I submit that it is therefore a trespasser in the city, and has no rights whatever.

The exclusive privilege granted to the said Covington Electric Light Company, if any, has been repealed by the Legislature and the Constitution of the State of Kentucky, under the authority of the Act of 1856, and said exclusive franchise, if any, has been forfeited by said company itself, in failing to comply with the provisions of its contract with

the State, and the laws and ordinances of the City of Covington.

I submit that if the old Covington Electric Light Company had an exclusive franchise under the Act of 1882 creating it, and if it was a corporation of such a public nature, and rendered such services to the public within the meaning of Section 3 of the Constitution which would entitle it to an exclusive privilege, then, in that event, it could not convey or alienate said exclusive privilege or franchise, or consolidate same with the Suburban Electric Light Company, in 1894, "without express legislative authority, authorizing it to alienate and sell such franchise." The Supreme Court of the United States has repeatedly held to this effect, and in Oregon Ry., etc., Co. vs. Oregonian R. Co., 130 U. S. 2, and Thomas vs. Millville, etc., R. Co., 101 U. S. 71, the Court held "that the use of the words 'successors or assigns,' in a proviso attached to a statute, making specific grants to a corporation, does not necessarily imply that the corporation can transfer all its property and its franchises to another corporation to be exercised by the latter." Upon the same principle I submit that neither the Covington Light Company nor the Suburban Electric Light Company has any power to alienate or sell this exclusive franchise or privilege, as it has attempted to do herein. There are no provisions in either charter, or articles of incorporation, empowering it to sell or assign its property or franchises, and the North American Company had no right to sell said alleged franchise to the Union Light, Heat and Power Company herein. I submit that the authorities are universal and conclusive upon this proposition.

The City of Covington has the power and privilege under its charter, Section 3058, Sub-section 6, of the Kentucky Statutes:

> "To provide by themselves, or through others, for lighting the streets, public places and buildings, and

furnishing light to the inhabitants, and to regulate the quality and quantity of light, and the method, time of and appliances for furnishing of the same; to compel any and all light companies or persons furnishing light to change and relocate gas mains, or pipes, or poles, electric wires and conduits for electric wires; to place those above the surface of the ground under it; to change the method of conveying the light, and generally to do things conducing to the safety and comfort of the inhabitants in the premises."

The City of Covington desires to have its own light plant to light its streets and public buildings. The people, by a large majority, voting on the proposition to issue bonds, have expressed their desire that the city should own its own light plant, and I submit that, under the law and facts in this case, neither the Suburban Electric Light Company, nor the Union Light, Heat and Power Company, has any exclusive franchise to light the streets and public buildings in the City of Covington.

It has been said that " Competition is the life of trade." If this is true, it should be invited, encouraged and protected, and not hindered. The claim of any exclusive privilege, franchise or monopoly naturally tends to defeat competition and restrain trade and commerce. If the company in question herein has the exclusive right (to the exclusion of all others) to furnish the City of Covington with electric light, then it can dictate and fix the price to be paid by the city for said light, and the city must submit and accept said terms or go without light, because there is no competition. An exclusive grant is never presumed. It must be proven, and if there is any doubt, it is to be resolved in favor of the public and against said claim.

I have not discussed the proposition " that injunction is not the proper remedy herein, but that the complainant's remedy is at law, and in an action for damages against the

city," because I believe the Court is perfectly familiar with this rule, and the injunction should be dissolved, and the petition dismissed for this reason, if for no other.

I respectfully submit that the city should be permitted to erect its own light plant, and the decree and judgment of the Court below should be affirmed.

Respectfully submitted.

F. J. HANLON,
City Solicitor.

AUTHORITIES CITED.

Appellants have no exclusive franchise or irrevocable contract.

Act of Legislature of Ky. of 1856, Sec. 1987 Ky Statutes.

Griffin vs. Ky. Insurance Co., 3 Bush, 592.

C. & O. R. R. Co. vs. Barren Co., 10 Bush, 604.

Deposit Bank of Owensboro vs. Davies Co., 102 Ky., 208.

Commonwealth vs. Cov. & Cin. Bridge Co., 14 Ky. L. R. 836.

Parker vs. R. R. Co., 109 Mass. 506.

Shields vs. Ohio, 95 U. S., 319.

Louisville Water Co. vs. Clark, 143 U. S. 1.

City of Covington vs. Kentucky, 173 U. S. 231.

Citizens' Savings Bank of Owensboro vs. City of Owensboro, 173 U. S. 634.

City of Louisville vs. Bank of Louisville, 174 U. S. 439.

Gulf & Ship Island R. R. Co. vs. Hewes, 183 U. S. 67.

Bienville Water Supply Co. vs. Mobile, 186 U. S. 212.

Northern Central Ry. Co. vs. State of Maryland, 187 U. S. 255.

The exclusive franchise claimed by appellants has been repealed by the Legislature of Kentucky and said exclusive franchise ceased to exist September 28th, 1897.

Sec. 573 Ky. Statutes, Act of April 5th, 1893.

Secs. 163 and 164 Constitution of Ky.
Williams vs. Nall, 21 Ky. L. R. 1527.
Sec. 3058, Sub-Sec. 6, Ky. Statutes.

The exclusive franchise of the Covington company did not pass to the consolidated company (the Suburban) by virtue of the articles of consolidation.

Secs. 556, 573 Ky. Statutes, Corporation Act of 1893.
6 Am. & Eng. Ency of Law (2d Ed.) 810, 811, 813, 818.
Shields vs. Ohio, 95 U. S. 319.
Maine Cent. R. R. Co. vs. State of Maine, 96 U. S. 499.
Atlantic and Gulf R. R. Co. vs. Georgia, 98 U. S. 359.
St. Louis R. R. Co. vs. Berry, 113 U. S. 465.
Keokuk & Western R. R. Co. vs. State of Missouri, 152 U. S. 301.

Yazoo Miss. Valley R.R. Co. v. West Adams 180 U.S. 2

The charter of the Covington company was forfeited for failure to perform and comply with conditions precedent in its charter and certain ordinances of the City of Covington.

Act of Apl. 22d, 1882, incorporating the Covington Company.
7 Am. & Eng. Ency. of Law (2d Ed.) 653
Ordinances of the City of Covington, 181-185 of Record.
Jones vs. Aspen Hardware Co. 21 Colo. 263.
Town of Williamsport, etc., vs. Kent & Co., 14 Ind. 306.
Bonham vs. Taylor, 10 Ohio. St. 108.
Boyd vs. Peach Bottom R. R. Co. 90 Pa. St. 169.
Fire Department of N. Y. vs. Kip, 10 Wend. (N. Y.) 266.
Mayor, etc., of Baltimore vs. Chesapeake & P. Tel. Co., 48 Atl. Rep. 465 (7 Mun. Corp. Cas. 7).

City of Toledo vs. Western Union Tel. Co., 107 Fed. Rep. 10.
Rice vs. Minn. & N. W. R. R. Co., 66 U. S. 358.
McCormick vs. Market Nat'l Bank, 165 U. S. 538.
Dillon on Municipal Corporations, Vol. 2, Secs. 680, 706.
Thompson on Corporations, Secs. 5470, 5473.

The question of forfeiture for non-compliance with charter provisions can be raised in this proceeding.

Oregonian Rwy. Co. vs. Oregon Ry. & Nav. Co., 23 Fed. Rep. 232.
Bonaparte vs. Baltimore R. R. Co., 75 Md. 340.
Brooklyn vs. City, etc., 78 N. Y. 524.
Farnham vs. Benedict, 107 N. Y. 169.
Welch vs. Old Dominion Co., 10 N. Y. Supp. 174.
West Manayunk Gas Co. vs. New Gas Co., 21 Pa. 369.
Sulphur Springs R. R. Co. vs. St. L. R. R. Co., 2 Tex. Civ. App. 650.
Bywaters vs. Paris, etc., R. R. Co., 73 Tex. 624.
Houston vs. Houston R. R. Co., 84 Tex. 581.
Stillman vs. Fredericksburg R. R. Co., 27 Gratt. (Va.) 119.
Rice vs. Minn. & N. W. R. R. Co., 66 U. S. 358.
McCormick vs. Market Nat'l Bank, 165 U. S. 538.
Capital City Light & Fuel Co. vs. Tallahassee, 186 U. S. 399.

Corporate grants by the State to corporations are construed strictly, and all doubts are resolved in favor of the public and against the corporation.

Minturn vs. Larue, 23 How. 475.
Northwestern Fertilizing Co. vs. Hyde Park, 97 U. S. 659.

Home Ins. Co. vs. N. Y., 134 U. S. 594.

Stein vs. Bienville Water Supply Co., 141 U. S. 67.

Porsall vs. Great Northern R. R. Co., 161 U. S. 646.

Louisville & N. R. R. Co. vs. Kentucky, 161 U. S. 677.

An exclusive franchise (exemption from competition) can not be sold and assigned by one corporation to another.

Winchester & Lexington T. P. Co. vs. Vimont, 5 B. Monroe 1.

Louisville Water Co. vs. Hamilton, 81 Ky. 517.

Turnpike Co. vs. Benj. Smith, 1 Ky. L. R. 68.

Old State Road & Ripple T. P. Co. vs. Smith, 1 Ky. L. R. 125.

McCabe's Admr. vs. Maysville & Big Sandy R. R. Co., 66 S. W. 1055.

7 Am. & Eng. Ency. of Law (2d Ed.), 747, 749.

Black vs. Delaware Canal Co., 22 N. J. Eq. 400.

South Yorkshire R. R. Co. vs. Great Northern R. R. Co., 3 DeG. & M. & G. 576.

Commonwealth vs. Smith, 10 Allen (Mass.) 448.

Morowetz on Private Corporations, Vol. 2 (2d Ed.), Sec. 930.

Atlantic Tel. Co. vs. Union Pac. R. R. Co., 1 McCrary (U. S.) 541.

Memphis & Little Rock R. R. Co. vs. Berry et al., 112 U. S. 609.

Chesapeake & Ohio R. R. Co. vs. Miller, 114 U. S. 176.

Thomas et al. vs. West Jersey R. R. Co., 101 U. S. 71.

Chicago B. & K. C. R. R. Co. vs. Mo., 122 U. S. 561.

Oregonian R. R. Co. vs. Oregon R. R. & Nav. Co., 130 U. S. 1.

Gibbs vs. Consolidated Gas Co. of Baltimore, 130 U. S. 396.

Pitts., C. & St. L. R. R. Co. vs. Keokuk & H. Bridge Co., 131 U. S. 371.

Chicago, M. & St. P. R. R. Co. vs. Chicago Third Nat'l Bank, 134 U. S. 276.

Central Transportation Co. vs. Pullman Palace Car Co., 139 U. S. 24.

L. & N. R. R. Co. vs. Com'th of Ky., 161 U. S. 677.

Cov. & Lex. T. P. Co. vs. Sandford, 164 U. S. 578.

Minn. & St. L. R. R. Co. vs. Gardner, 177 U. S. 330.

Supreme Court of the United States.

No. 246.—October Term, 1903.

Charles H. Shaw, Trustee; The Union Light, Heat & Power Co., and the Suburban Electric Co., Appellants,
vs.
The City of Covington et al.

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

[May 31, 1904.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit in equity brought by the appellants to enjoin the City of Covington from setting up an electric plant to furnish light, heat, and power to the city and its citizens. The ground of the suit is that the intended action of the city will impair the obligations of a contract with the Suburban Electric Company, contrary to article 1, section 10, of the Constitution of the United States. The plaintiff Shaw is trustee in bankruptcy of the Electric Company. The contract set up consists of a clause in a charter granted by the legislature of Kentucky on April 22, 1882, to the Covington Electric Light Company. By § 5 the business of the company is limited to furnishing the City of Covington, its inhabitants, and others near the city, with light, motive power, and heat, and the company is given "the exclusive privilege of conducting the business above described within and adjacent to said city for the term of twenty-five years, but a non-user of the privilege of this act of incorporation for five years shall work a forfeiture." One of the contentions of the defendants is that this privilege was lost by non-user. But as our judgment proceeds upon other grounds we say nothing about that, but assume, for the purposes of decision, that the privilege was acquired, subject to the general reservation by the State of the power to repeal. *Hamilton Gaslight & Coke Co.* v. *Hamilton*, 146 U. S. 258; *Citizens' Savings Bank* v. *Owensboro*, 173 U. S. 636.

The Circuit Court dismissed the bill on the grounds that this privilege was repealed from and after September 28, 1897, by what is now § 573 of the Kentucky statutes (1894), or would have been repealed if not previously lost by the consolidation of the Covington Electric Light Company with other companies on April 11, 1894, as the court thought that it had been. The plaintiffs appealed to this court. They are met at the outset by the dilemma, that either the action of the municipality is sanctioned by the State, in which case the State must be taken to have exercised its

reserved right to repeal its grant to that extent, or the action of the municipality is not so sanctioned, in which case it cannot be a law impairing the obligation of contracts within the clause of the Constitution, and the plaintiffs are out of court. *Hamilton Gas Light & Coke Co.* v. *Hamilton*, 146 U. S. 258; *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379, 385. See *Joplin* v. *Southwest Missouri Light Co.*, 191 U. S. 150, 155, 156. But in view of *City Railway Co.* v. *Citizens' Street R. R. Co.*, 166 U. S. 557, we do not stop to consider this point further, as the result will be the same whatever the ground.

As we have implied, the original grantee of the exclusive privilege consolidated with other companies on April 11, 1894. This was done under what are now §§ 555 and 556 of the Kentucky statutes. By the latter section, when the agreement of consolidation is recorded, &c., "the separate existence of the constituent corporations shall cease, and the consolidated corporations shall become a single corporation in accordance with the said agreement, and subject to all the provisions of this chapter, and other laws relating to it, and shall be vested with all the property, business, credits, assets and effects of the constituent corporations without deed or transfer, and shall be bound for all their contracts and liabilities." The old companies disappear and the new company must claim whatever rights it gets from the law which calls it into being. It is absolutely subject to the Constitution and laws then in force. Therefore it can claim the franchises and privileges of its constituent companies by succession, only under the words "property," or "assets and effects," if at all. These words certainly are not happily chosen to express the transfer of a franchise, still less to express the continuance of a right not to be competed with, granted by the legislature to a named corporation, after that corporation shall have ceased to exist. The natural meaning of the words would be that the ordinary property of the consolidating corporations, the property such as any one might own without special franchise and might transfer by deed, shall belong to the new company without deed, but the franchises of the new company would seem to be left to be determined by the general law. The new corporation is to be "subject to all the provisions of this chapter, and other laws relating to it." This interpretation is strengthened by the consideration that other sections show that the Legislature had franchises and privileges before its mind, and evidently did not fail to mention them from forgetfulness. In the cases cited by the appellants the privileges and franchises of the constituent companies were continued in the new company by explicit and careful words. *Philadelphia & Wilmington R. R.* v. *Maryland*, 10 How. 376; *New Orleans Gas Light Co.* v. *Louisana Light & Heat Producing & Manufacturing Co.*, 115 U. S 650.

The impression that the plaintiffs did not inherit a right to exclude the City of Covington from setting up a plant before 1907 as the result of the consolidation is confirmed still further when we consider the state of the law at the time. By § 191 of the Constitution of 1891 "all existing charters or grants of special or exclusive privileges, under which a *bona fide* organization shall not have taken place, . . . shall thereafter be void and of no effect." Again, by § 164, no city can grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years, and the grantee is to be the highest and best bidder at a public offer. We assume that the Covington Electric Light Company escaped these sections, but they show the policy of the State to have been against such a right as it claimed. It is doubtful, at least, whether the legislature could have granted it in 1894; and this is a reason the more for construing the strict language of the consolidation sections to have meant no more than they said. We may add to the foregoing, as indicative of the general jealousy of exclusive rights, § 3 of the bill of rights: "No grant of exclusive . . . privileges shall be made to any man or set of men except in consideration of public services." It was uncertain, until decided, whether under this section such an exclusive right as that of the Covington Electric Light Company could be granted, and the prevailing local opinion was that such grants were forbidden. *Louisville Gas Co.* v. *Citizens' Gas Light Co.*, 115 U. S. 683; *S. C.*, 81 Ky 263. This, again, goes to show that the meagre words used in describing the rights of the new company were chosen with intelligent care. Everything in the Constitution looked to the abolition and refusal of special privileges and to putting all corporations on an equal footing. It was natural, therefore, when old corporations consolidated, that the law should treat the new corporation which it then called into being as it would have treated another corporation coming into being at the same time, but starting fresh, instead of being a consolidation of the old. We refer again to the words, "subject to all the provisions of this chapter, and other laws relating to it," in § 556.

Finally, we add to the language of the Constitution the section of the statutes which the Circuit Court adjudged to have repealed the grant of a monopoly to the original company. By § 573 the provisions of all charters "which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897," and the exercise of the repealed powers is made a crime. After September 28, 1897, the provisions of the chapter are to apply to all corporations if they would be applicable to such corporations if organized under that chapter. There was nice discussion, and it is a fair question whether this section did not repeal the exclusive privilege given to the Covington company

in 1897, if that privilege survived the consolidation. But we refer to it only as an aid in construing § 556. It is another evidence of the wish and intent of the legislature to bring all corporations to a level when it could.

Practically it was admitted that the new corporation formed by consolidation in 1894, was subject to the statutes and Constitution then in force. *Yazoo & Mississippi Valley* v. *Adams*, 180 U. S. 1. To deprive the proposition would be to discredit the whole of the appellants' case. But that being so, we think that we have shown that the policy of the law at the time of the passage of the consolidation statute, Ky. Stats. § 556, Act of April 5, 1893, was entirely opposed to the continuance of such a special right as is claimed, and therefore have given a sufficient reason for construing the words as meaning what they seem on their face to mean and no more. It may be doubted whether the legislature could have kept the Covington Light Company monopoly alive in the hands of a new and distinct corporation. *Keokuk & Western R. R.* v. *Missouri*, 152 U. S. 450. But at all events we are satisfied that it did not try to do so. See *Yazoo & Mississippi Valley R. R.*, 180 U. S. 1.

In the very able argument for the appellant an attempt was made to detach the exclusive privilege, given by § 5 of the Covington Electric Light Company's charter, from "conducting the business," to which it was attached by that section, and to transfer it to the "privilege," granted by § 6, "subject to the regulations of the city authorities, to lay its pipes and mains, and erecting its poles, posts and wires through and along any street," &c. The latter, it is said, is an easement, the exclusive character is part of it, and it all goes, like any other property, to the successors of the Covington Company. We cannot be so ingenious. However the plaintiffs may stand as to using the streets, the Covington Company's monopoly in business was distinct from its rights in the streets. When the Covington Company died its monopoly came to an end.

Decree affirmed.

Mr. Justice WHITE dissented.

True copy.

Test:

Clerk Supreme Court, U. S.